PRACTICE MANUAL

SELECTIVE SERVICE LAW REPORTER
A Project of the Public Law Education Institute

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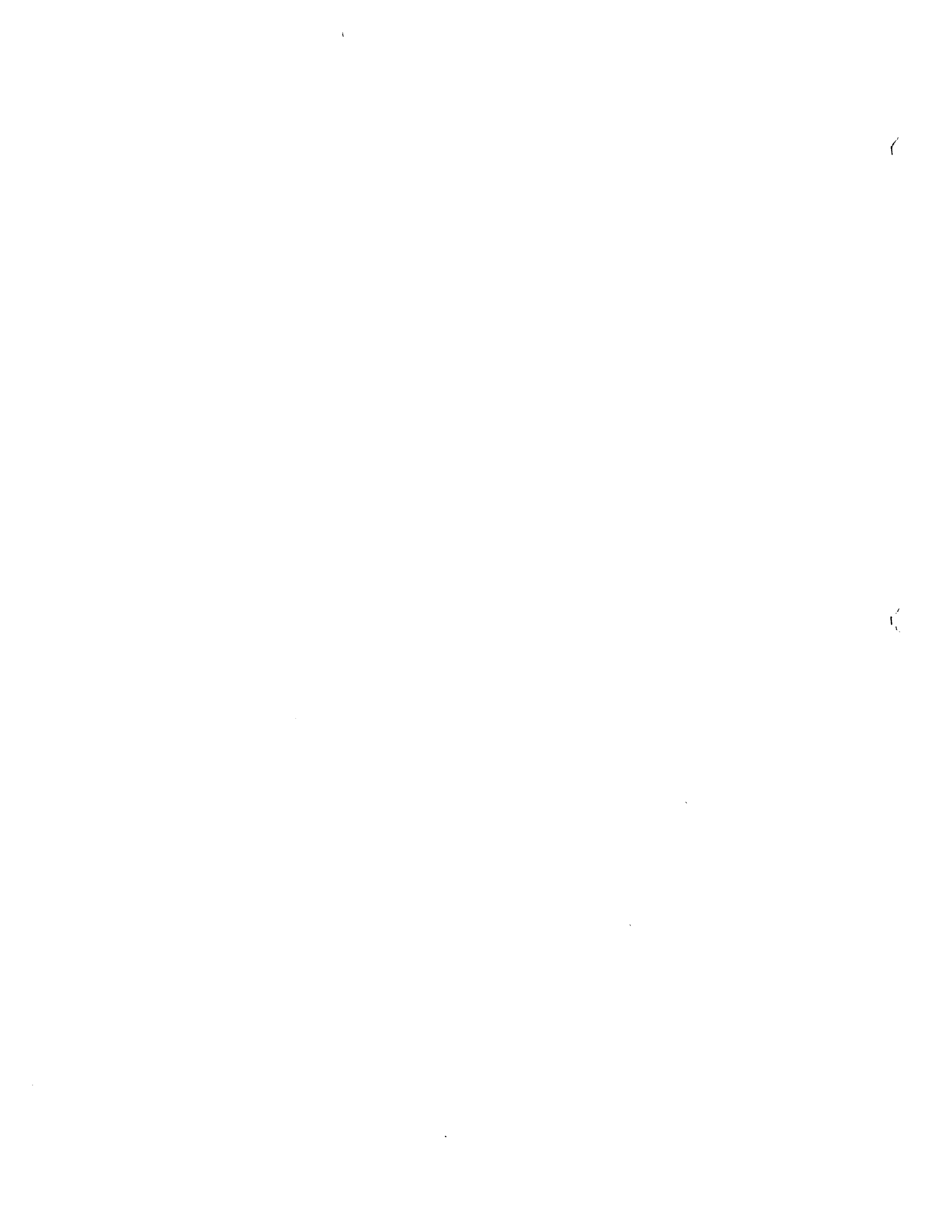

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FOREWORD

This *Practice Manual* is the first book of its kind–an attempt to restate the law of selective service by integrating statutory and regulatory provisions with the cases construing them and with legal literature critically examining the Selective Service System.

The reader will best be introduced to the *Manual* by scanning the Analytical Table of Contents, which lists the title of each numbered paragraph in outline form. The *Manual*'s first three Parts, those completed at this writing, describe the structure of the Military Selective Service Act of 1967, the administrative process of the Selective Service System, and provide attorneys with a trial manual for the defense of criminal prosecutions arising under the selective service law.

The first two sections of the *Manual,* are, therefore, useful as a guide to the operation of the Selective Service System, and should be read in conjunction with the statutory and regulatory provisions dealing with classification and processing.

The criminal section of the *Manual,* Part III, deserves another comment. Every trial manual in a specialized field strives to accomodate two competing concerns: the desire to avoid prolixity by concentrating narrowly upon the subject matter of the field under discussion; and, on the other hand, the desire to ensure that every procedural step and device by which claims may be raised is described or at least referred to. We have solved this probelm by spending the first half of Part III describing the structure of the typical selective service trial, noting points of similarity and difference as compared with federal criminal trials in other fields of law. The discussion goes into considerable detail at points where special applications of general rules are found in selective service cases. Forms and other practive aids are provided in the text at appropriate places. The *Manual* serves, therefore, as an introduction to federal criminal practice as well as a selective service practice manual. Following this discussion, some defenses which recur in selective service cases are taken up. The concluding portion of the *Manual* analyzes each selective service offense–its elements, the venue in which it must be prosecuted, the special problems of substantive and procedural law it raises, and the principal defenses to a charge that the defendant has committed it. Obviously, this section of the *Manual* must be read in connection with the first, for the defenses to most cases of refusal of induction or of alternative service (by far the majority of selective service prosecutions) rest upon alleged errors in the administrative process.

The *Manual* is principally the work of the undersigned, who has been Editor-in-Chief of the *Selective Service Law Reporter* since its beginning early in 1968. However, credit must go as well to the Board of Directors of the Public Law Education Institute, who contributed editorial advice at the manuscript stage, and to the *Reporter*'s Managing Editor, Charles J. Schoefer, who drew upon his expertise and experience. In addition, the *Reporter* has had the benefit of assistance from some of the country's leading practitioners and scholars in this emprise: Professor John Griffiths, Marvin Karpatkin, Melvin Wulf, Michael B. Standard, and J. B. Teitz contributed generously by reading part or all of the manuscript, and making helpful suggestions. Professor Griffiths' Yale Law School students contributed to several portions of the manuscript, and their contributions are acknowledged at appropriate points. 1968 Summer Interns of the Public Law Education Institute, Robert J. Zweben and William Briggs, and the Institute's Summer 1968 Fellow, Kendall M. Barnes, also gave assistence in the form of research, discussion and citechecking. (The Law Students Civil Rights Research Council provided Mr. Zweben's services.) Citechecking was also done by Robert Hodge and David Peterson. Composition was done by the able and tireless Virginia Sponsler, Executive Secretary of the *Reporter* from February to August 1968, K. Alicyn Ferrell, Executive Secretary beginning in August, and Margaret Coakley, Miss Ferrell's assistant. A word of acknowledgement must also go to the UCLA Law School, which made available its library facilities to the Editor-in-Chief to permit him to write the text of Part III without interruption and away from the ringing telephone.

Michael E. Tigar
October 1968

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ANALYTICAL TABLE OF CONTENTS

I. *INTRODUCTION TO SELECTIVE SERVICE*

A. Scope Note

¶1. Scope Note

B. Historical Background

¶2. The Historical Background of Conscription

C. Constitutionality of Conscription

¶3. Constitutionality of Conscirption

D. Outline of the Military Selective Service Act

¶4. The Act Generally
¶5. Sec. 1 -- Citation and Policy
¶6. Sec. 2 -- Size of Force (repealed)
¶7. Sec. 3 -- Duty to Register
¶8. Sec. 4(a) -- Qualifications, Induction, Training
¶8.1 Liability Beyond Age Limit -- Refusal to "Report"
¶9. Secs. 4(b), 4(k) -- Length of Service, Reduction of Service, National Security Training Corps
¶10. Sec. 4(c) -- Volunteers, Enlistees
¶11. Sec. 4(d) -- Transfer to Reserves, Length of Obligation
¶12. Sec. 4(f) -- Compensation from Civilian Employer
¶13. Sec. 4(g) -- National Security Council -- Critical Occupations
¶14. Sections 4 and 5 -- Provisions for Induction of Doctors, Dentists and Allied Medical Specialists
¶15. [Vacant]
¶16. [Vacant]
¶17. Sec. 5(a) Generally -- Selection -- Principles and Order
¶18. Sec. 5(b) -- Quotas
¶19. Sec. 6 -- Exemptions from Registration and Service -- Deferments
¶20. Sec. 7 (Repealed)
¶21. Sec. 8 -- Bounties and Substitute Service
¶22. Sec. 9 -- Rights of Inductees and Enlistees -- Certificate of Separation, Physical Examination, Reemployment, Voting
¶23. Sec. 10 -- Establishment of the System -- Rule-Making Authority
¶24. Injury or Death of Registrants While Acting Under Orders
¶25. Sec. 12(a) -- Criminal Penalties for Interference with the Administration of the Act or Failure to Perform Required Duties -- False Statements -- Conspiracy -- Trial
¶26. Sec. 12(b) -- Offenses Relating to Certificates
¶27. Sec. 13 -- Exemption of the System from Certain Laws
¶28. Sec. 15 -- Notice, Severability, Enlistments
¶29. Sec. 16 -- Definitions
¶30. Secs. 17 through 21

E. Regulatory Materials Issued By the System and Its Components

¶31. Regulatory Material Generally -- Freedom of Information
¶32. Regulations -- Publication, Validity, Failure to Follow
¶33. Local Board Memorandums
¶34. Other Material Issued by National Headquarters
¶35. Materials Issued by State Directors
¶35.1 Regulations Issued by Other Agencies

F. Boards, Agencies, and Personnel of the System

¶36. The President
¶37. The Director of Selective Service
¶38. National Headquarters
¶39. National Selective Service Appeal Board
¶40. State Director -- Office of State Director
¶41. Appeal Board -- Qualifications, Area, Appointment
¶42. Local Boards -- Composition, Appointment, Quorums
¶43. The National Security Council -- II-A and Graduate II-S Deferments
¶44. National Advisory Committee, Medical
¶45. Government Appeal Agent -- Qualifications, Duties, Powers
¶46. Advisors to Registrants -- Qualifications, Appointment, Posting of Names
¶47. Medical Advisor -- to State Director, to Local Board
¶48. Clerical Employees of Local Board
¶¶49-1000 [Vacant]

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A. Scope Note
¶1001. Scope Note

B. The Administrative Process Generally
¶1002. Administrative Process Generally

C. Counsel in Selective Service Proceedings
¶1003. Counsel in Selective Service Proceedings -- Is there a Right?
¶1004. Criminal Liability for Counseling
¶1005. The Lay Counsellor -- Group Legal Services to Registrants
¶1006. What Can the Lawyer Do?

D. Registration Requirements and Procedures
¶1007. Who Must Register? -- Exemptions from Registration
¶1008. Time for Registration
¶1009. Where to Register
¶1010. Domestic Registration Procedures
¶1011. Foreign Registration Procedures
¶1012. Preparation of Registration Certificate -- Selective Service Number
¶1013. Registration Certificate -- Possession Requirement
¶1014. Duplicate Registration Cards
¶1015. Cancellation of Registration

E. Initial Classification Information -- Form 100 and Other Information-Gathering Devices
¶1016. Initial Classification by Local Board -- General Rules
¶1017. Form 100 -- Classification Information
¶1018. Series III -- Marital Status and Dependents
¶1019. Series IV -- Registrant's Family
¶1020. Series V -- Occupation
¶1021. Series VI -- Agricultural Occupation
¶1022. Series VII -- Minister or Ministerial Student
¶1023. Series VIII -- Conscientious Objector
¶1024. Series IX -- Education
¶1025. Series X -- Statement of Alien
¶1026. Series XI -- Physical Condition
¶1027. Series XII -- Court Record
¶1028. Means Other than Form 100 for the Board to Gather Information -- In General
¶1029. Information and Claims from Other than the Registrant
¶1030. Information-Gathering by Subpena
¶1031. Information from Other Agencies

F. The Various Selective Service Classifications Explained and Discussed
¶1032. Selective Service Classifications -- Generally
¶1033. Class I-A
¶1034. Classes I-A-O and I-O -- Conscientious Objection -- Legislative Definition
¶1035. Conscientious Objection -- Legislative History up to 1967
¶1036. Conscientious Objection -- The 1967 Amendment in Light of *Seeger*
¶1037. [Vacant]
¶1038. Conscientious Objection -- Distinctions and Discriminations in Defining "Religion"
¶1039. Conscientious Objection -- Participation In War In Any Form
¶1040. Conscientious Objection -- The Distinction Between I-O and I-A-O
¶1041. Conscientious Objection -- Filing Form 150
¶1042. Conscientious Objection -- Form 150 -- Series I (Claim for Exemption)
¶1043. Conscientious Objection -- Form 150 -- Series II (Religious Training and Belief)
¶1044. Conscientious Objection -- Form 150 -- Series III (General Background)
¶1045. Conscientious Objection -- Form 150 -- Series IV (Participation in Organizations)
¶1046. Conscientious Objection -- Form 150 -- Series V
¶1047. Conscientious Objection -- Form 150 -- Registrant's Certificate
¶1048. Conscientious Objection -- Form 151 -- Volunteer for Civilian Work
¶1048.1 Conscientious Objection -- Raising Claim after Order to Report for Induction
¶1049. Class I-C -- Military Personnel
¶1049.1 Class I-D -- Reservists, National Guardsmen, Students Taking Military Training
¶1050. Class I-S High School and (Some) College Students
¶1051. Class I-W -- CO Performing Civilian Alternative Service
¶1052. Class I-Y -- Not Eligible for Lower Class, but Would Be Qualified in Time of War or National Emergency
¶1053. Class II -- Generally

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¶1054. Class II-A -- Civilian Occupation -- Critical Skills and Preparing for Critical Skills
¶1055. Class II-A -- Apprentices
¶1056. Class II-C -- Agricultural Occupation
¶1057. Class II-S -- Statutory Undergraduate Deferment
¶1058. Class II-S -- Graduate Students
¶1059. Class III-A -- Generally
¶1060. Class III-A -- Registrant with Child or Children
¶1061. Class III-A -- Extreme Hardship to Dependents
¶1062. Class IV-A -- Registrants Who Have Completed Service -- Sole Surviving Son
¶1063. Class IV-B -- Officials Deferred by Law
¶1064. Class IV-C -- Aliens Exempt from Training and Service
¶1065. Class IV-D (Ministers and Divinity Students) -- Ministers Generally
¶1066. Class IV-D -- "Regular" or "Duly-Ordained" Minister
¶1067. Class IV-D -- Definition of "Church, Sect or Organization."
¶1068. Class IV-D -- "Customary Vocation"
¶1069. Class IV-D -- Divinity Students
¶1070. Class IV-F -- Not Qualified for Any Military Service
¶1071. Class V-A -- Registrants Over the Age of Liability
¶1071.1 Special Classification Problems of Doctors, Dentists and Allied Medical Specialists

G. Classification Procedure at Local Board Level

¶1072. Classification Procedure -- Generally
¶1073. Classification Procedure -- What Is A "File?"
¶1074. Classification Procedure -- The "Open File" Rule -- Building a Record
¶1075. Classification Procedure -- The Need for Basis in Fact and Basis in the Record
¶1076. Classification Procedure -- Record of Board Action -- Possession of Notice of Classification
¶1077. Classification Procedure -- Disqualification
¶1078. Classification Procedure -- Transfer for Classification

H. Personal Appearance before Local Board

¶1079. The Personal Appearance -- Right of Registrant -- First Steps
¶1080. Personal Appearance -- Conducting the Personal Appearance
¶1081. Personal Appearance -- Special Problems of the CO Applicant
¶1082. Personal Appearance -- Special Problems of the II-A Claimant
¶1083. Personal Appearance -- Special Problems of III-A Claimants (Hardship)
¶1084. Personal Appearance -- Special Problems of the IV-D Claimant

I. Appeal to Appeal Board

¶1085. Personal Appearance Terminated -- New Notice of Classification -- Appeal
¶1086. Appeal -- Statement of Issues
¶1087. Appeal Procedure
¶1088. Transfer of Appeal -- Occupational Deferment Cases, Other Cases, Disqualification
¶1089. Reconsideration by Appeal Board

J. Appeal to National Selective Service Appeal Board

¶1090. Appeals Beyond the Appeal Board -- Generally
¶1091. Appeal to the President or National Board -- Who May Appeal -- How Appeal is Begun
¶1092. Appeal to National Board -- Preliminary Review
¶1093. Appeal to National Board -- Procedure
¶1094. Appeal to National Board -- Practical Considerations in Seeking Appeal

K. Reopening a Registrant's Classification

¶1095. Reopening a Classification -- Classification Anew -- General Information
¶1096. Nonmandatory Reopening -- Checks on Board Discretion
¶1097. Changes in Status -- Duty to Report

L. Delinquency

¶1098. Delinquency -- Generally
¶1099. Delinquency -- Declaring Registrant Delinquent
¶1100. Delinquency -- Reclassification, Appeal, Reopening
¶1101. Delinquency -- The Delinquent Nonregistrant
¶1102. Delinquency -- Purging the Declared Delinquency
¶1103. Delinquency -- Declared Delinquent Reporting to a Local Board Other than His Own
¶1104. Delinquency -- Non-Declared Delinquents
¶1105. Delinquency -- Reporting Delinquents to the Justice Department
¶1106. Delinquency -- Record of Delinquents
¶1107. Delinquency -- Suspected Delinquents

M. Medical or Psychiatric Unfitness

¶1108. Medical or Psychiatric Unfitness -- Generally
¶1109. Medical or Psychiatric Unfitness -- Initial Steps by Registrant and Lawyer

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¶ 1110. Medical or Psychiatric Unfitness -- The Medical Interview
¶ 1111. Medical or Psychiatric Unfitness -- The Board Decision
¶ 1111.1 Medical or Psychiatric Unfitness -- Psychiatric Problems
¶ 1112. Medical or Psychiatric Unfitness -- Late Claims
¶ 1113. Medical or Psychiatric Unfitness -- Transfer of Medical Interview

N. Armed Forces Physical -- Medical, Mental, Moral, Loyalty Qualifications
¶ 1114. Armed Forces Physical -- Call for Physical
¶ 1115. Armed Forces Physical -- Postponement and Transfer
¶ 1116. Armed Forces Physical -- Procedure for Examination
¶ 1117. Armed Forces Physical -- Security Questionnaire
¶ 1118. Armed Forces Physical -- Moral Standards
¶ 1119. Armed Forces Physical -- Required Records
¶ 1119.1 Armed Forces Physical -- Challenging Results

O. Induction
¶ 1120. Induction -- Generally
¶ 1121. Induction -- Order of Call -- Generally
¶ 1122. Induction -- Order of Call -- Age Group Calls -- Prime Age Group
¶ 1123. Induction -- Volunteers
¶ 1124. Induction -- Postponement of Induction
¶ 1125. Induction -- Transfer of Induction
¶ 1126. Induction -- Noncombatants
¶ 1127. Induction -- Reporting and Submitting
¶ 1128. Induction -- Special Calls for Doctors, Dentists and Allied Medical Specialists

P. Alternative Service for Conscientious Objectors
¶ 1129. Order to Report for Civilian Work -- Generally
¶ 1130. Order to Report for Civilian Work -- Selecting the Work
¶ 1131. Order to Report for Civilian Work -- Reporting

III. CRIMINAL TRIALS UNDER THE SELECTIVE SERVICE LAW

A. Introduction

1. Scope Note
¶ 2001. Scope Note

2. How Offenses Are Defined in Selective Service Law
¶ 2002. Definition of Offenses -- Legislative History
¶ 2003. Definition of Offenses -- Statutory Definition
¶ 2004. Definition of Offenses -- Offenses Defined by Regulation
¶ 2005. Definition of Offenses -- Definition by Board Order

3. The Selective Service Client
¶ 2051. The Selective Service Client -- Ethical Problems

B. Steps in a Selective Service Case

1. Steps Prior to Arraignment and Plea
¶ 2101. Facts Giving Rise to the Charge -- Initial Government Response -- Conversations with Government Agents
¶ 2102. Interviewing the Client
¶ 2103. Finding the Facts
¶ 2104. Preindictment Negotiations
¶ 2105. The Grand Jury
¶ 2106. The Indictment
¶ 2107. Bail

2. Arriagnment and Plea
¶ 2108. Arraignment and Plea -- Appointment of Counsel
¶ 2109. Plea -- Not Guilty
¶ 2110. Plea -- Guilty or Nolo Contendere -- Generally
¶ 2111. Plea -- Plea Bargaining
¶ 2112. Transfer of Case from the District for Plea and Sentence -- F.R.Crim.P. 20

3. Pretrial Motions
¶ 2201. Pretrial Motions Generally
¶ 2202. Sufficiency of the Indictment
¶ 2203. Bill of Particulars
¶ 2204. Jury Selection
¶ 2205. Discovery Generally
¶ 2206. Discovery -- Rules 16 and 17
¶ 2207. Discovery -- Grand Jury Minutes
¶ 2208. Raising Constitutional Issues Prior to Trial

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¶ 2209. Raising Factual Matters Prior to Trial
¶ 2210. Change of Venue Prejudice in the District
¶ 2211. Change of Venue Rule 21(b) -- Forum Non Conveniens
¶ 2212. Search and Seizure
¶ 2213. Statute of Limitations

4. *Trial*
¶ 2251. Trial -- Generally
¶ 2252. Educating the Judge
¶ 2253. The Trial Memorandum
¶ 2254. Should It Be A Jury Trial?
¶ 2255. Voir Dire
¶ 2256. Opening Statements
¶ 2257. Special Evidence Problems -- Selective Service Records
¶ 2258. Board Members As Witnesses
¶ 2259. Objections to Evidence
¶ 2260. Cross-Examination of Government Witnesses
¶ 2261. Motion for Acquittal
¶ 2262. The Defendant As Witness
¶ 2263. Other Defense Evidence -- On the Merits
¶ 2264. Motion for Judgment of Acquittal Renewed
¶ 2265. Jury Instructions
¶ 2266. Closing Argument
¶ 2267. Posttrial Motions -- Judgment of Acquittal
¶ 2268. Posttrial Motions -- New Trial
¶ 2269. Posttrial Motions -- In Arrest of Judgment
¶ 2270. Sentencing Procedures -- Tactical Considerations -- Sentencing Provisions
¶ 2271. Presentence Report
¶ 2272. Memorandum Concerning Sentencing
¶ 2273. Sentencing
¶ 2274. Bail Pending Appeal
¶ 2275-76 [Vacant]

5. *Appeal and Post-Conviction Remedies*
¶ 2277. Appeal to Court of Appeals
¶ 2278. Procedural Requirements
¶ 2279. Briefing a Selective Service Case
¶ 2280. Certiorari
¶ 2281. Post-conviction -- Attack on the Judgment
¶ 2282. Post-conviction Relief -- Correction or Reduction of Sentence
¶ 2283. Parole

C. *Particular Defenses*
¶ 2301. Defenses -- Generally

1. *Constitutionality of Conscription*
¶ 2302. The Constitutionality of Conscription -- Generally
¶ 2303. Article I and the Powers of Congress
¶ 2304. Thirteenth Amendment
¶ 2305. Issues of Personal Liberty
¶ 2306. Relevance of Issue to Particular Cases
¶ 2307. Foreclosure of the Defenses -- *Dennis v. United States*
¶ 2308. Problems of Proof

2. *Illegal War*
¶ 2326. Illegality of War Registrant is Conscripted to Fight In
¶ 2327. Issues in the Nurnberg Defense -- The Basic Preeedent
¶ 2328. Issues -- War Crimes and Crimes Against Humanity
¶ 2329. Issues -- Legality Under American Law
¶ 2330. Justiciability
¶ 2331. Relevance of Issue to Particular Cases
¶ 2332. The Tactical Decision to Make the Defense
¶ 2333. Raising the Issue -- Problems of Proof

3. *Constitutional Procedural Defects*
¶ 2351. Fundamental Procedural Defects in the System
¶ 2352. Denial of the Right to Counsel
¶ 2353. Denial of Other Procedural Rights

4. *Substantive Illegality of Classification Standards*
¶ 2376. Substantive Challenges to Classification Practices
¶ 2378. Problems of Standing and Proof

D. *Particular Offenses -- Section 12(a)*
¶ 2401. Particular Offenses -- Section 12(a) -- Generally

1. *Refusal to Submit to Induction*
¶ 2402. Refusal to Submit to Induction -- Generally
¶ 2403. Pre-Offense Advising

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¶2404. Elements of the Offense
¶2405. Venue
¶2406. Aspects of the Negotiation Process
¶2407. Defenses -- Generally
¶2408. Defenses -- No Basis in Fact
¶2409. Defenses -- Error of Law
¶2410. Defenses -- Procedural Error
¶2411. Special Problems -- Judicial Review Foreclosed -- Failure to Exhaust Remedies Within the System
¶2412. Special Problems -- What Is A Jury Issue?
¶2413. Special Problems -- Going Outside the File
¶2414. Sentencing

2. *Refusal to Report for or Remain in Civilian Work*
¶2426. Refusal to Report for or Remain in Civilian Work -- Generally
¶2427. Elements of the Offense
¶2428. Venue
¶2429. Aspects of the Negotiation Process
¶2430. Defenses -- Generally
¶2431. Defenses -- Suitable Civilian Work
¶¶2432-40. [Vacant]
¶2441. Special Problems -- Exhaustion of Remedies in Selecting Civilian Work
¶2442. Sentencing

3. *Refusal or Failure to Report for Induction*
¶2451. Refusal or Failure to Report for Induction -- Generally
¶2452. Elements of the Offense
¶2453. Venue
¶2454. The Central Problem of "Exhuastion of Remedies"
¶2455. Exceptions to the Rule -- Section 10(b)(3)
¶2456. Exceptions to the Rule -- Questions of "Law"

4. *Refusal to Report for Physical Examination*
¶2476. Refusal to Report for Physical Examination
¶2477. Elements of the Offense
¶2478. Venue

5. *Refusal or Failure to Register*
¶2501. Refusal or Failure to Register -- Generally
¶2502. Elements of the Offense
¶2503. Venue
¶2504. Statute of Limitations

6. *Failure to Perform Sundry Other Duties*
¶2526. Failure to Perform Sundry Other Duties
¶2527. Elements of Offenses
¶2528. Venue
¶2529. Defenses -- Substantial Compliance
¶2530. Defenses -- The Problems of Intent

7. *Offenses Involving False Statements*
¶2551. False Statements -- Generally
¶2552. False Statements -- Elements of the Offenses
¶2553. Venue
¶2554. Special Problems -- Pleading Falsity
¶2555. Special Problems -- Pleading "Materiality"
¶2556. Special Problems -- Foreclosure from Making Defenses of Unconstitutionality

8. *Offenses by Selective Service Officials*
¶2576. Prosecuting the System's Officials

9. *Counselling or Aiding Refusal or Evasion*
¶2601. Counselling, Aiding and Abetting Refusal or Evasion
¶2602. Elements of the Offense
¶2603. Venue
¶2604. Defenses -- The Keegan-Okamoto Doctrine
¶2605. Defenses -- The First Amendment
¶2606. Act Counselled Not A Crime

10. *Hindering Administration of the Act*
¶2626. Hindering or Interfering With the Administration of the Act
¶2627. Elements of the Offense
¶2628. Venue

11. *Conspiracy*
¶2651. Conspiracy -- Generally
¶2652. Elements of the Offense
¶2653. Venue
¶2654. Defenses -- Defending on Ground of Lack of Intent
¶2655. Defenses -- Punishing More Agreement

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¶ 2656. Defenses –– Establishing Lack of Concert
¶ 2657. Other Defenses
¶¶ 2658-59. [Vacant]
¶ 2660. Procedural Advantages of Conspiracy –– For the Prosecution
¶ 2661. Procedural Advantages for the Defense
¶ 2662. Special Problems of Pleading
¶ 2663. The Defendant as Witness

E. Particular Offenses –– Section 12(b)
¶ 2701. Particular Offenses –– § 12(b)

1. The "Fraud" Offenses
¶ 2702. The Fraud Provisions of § 12(b)(1), (2), (3), (4), and (5)
¶ 2703. Elements of the Offenses, Generally
¶ 2704. Section 12(b)(1)
¶ 2705. Section 12(b)(2)
¶ 2706. Section 12(b)(3), Except Mutilation
¶ 2707. Section 12(b)(4)
¶ 2708. Section 12(b)(5)
¶ 2709. The Presumption of Intent
¶ 2710. Venue
¶ 2711. Defenses
¶ 2712. Special Problems in the Pleading of Fraud

2. Mutilation or Destruction of Certificates
¶ 2751. Section 12(b)(3) –– Mutilation and Destruction
¶ 2752. Elements of the Offense
¶ 2753. Venue
¶ 2762. Special Problems of Pleading

3. Nonpossession of Cards
¶ 2776. Failure to Possess "Draft Cards"
¶ 2777. Is It a Crime Not to Possess?
¶ 2778. Elements of the Offense, If It Is an Offense

IV. CIVIL ACTIONS AND SELECTIVE SERVICE

¶ 3001. Scope Note for Part IV

A. Habeas Corpus
¶ 3026. Some background of Habeas Corpus
¶ 3027. Habeas Corpus Generally –– When it Should Be Used
¶ 3028. Outline of a Habeas Corpus Case

1. Statutes and Rules Governing Habeas Corpus
¶ 3051. Jurisdiction –– Statutory Provisions
¶ 3052. Did the 1967 Amendments to the Act Do Away With Habeas Corpus?
¶ 3053. Application of the Federal Rules of Civil Procedure

2. Parties
¶ 3076. Parties Plaintiff
¶ 3077. Parties Respondent

3. Pleading and Service
¶ 3101. Where to File the Petition –– District Judge, Circuit Judge, Supreme Court Justice
¶ 3102. When to File the Petition –– Custody as a Procedural Requirement and a Jurisdictional Datum
¶ 3103. When to File the Petition –– Advising the Client
¶ 3104. When to File the Petition –– As a Matter of Convenience
¶ 3105. Habeas Corpus Prior to Induction
¶ 3106. Habeas Corpus After Refusal of Induction
¶ 3107. Service of Process
¶ 3108. Form of Petition for Habeas Corpus
¶ 3109. Proceeding In Forma Pauperis
¶ 3110. Applying for Provisional Relief
¶ 3111. Possible Judicial Responses –– Dismissal or Order to Amend
¶ 3112. Order to Show Cause
¶ 3113. Return to the Writ
¶ 3114. Grant of Hearing on the Petition
¶ 3115. Appointment of Counsel
¶ 3116. Bail Pending Disposition of the Petition

4. Trial or Hearing
¶ 3126. Production of the Body of the Detainee
¶ 3127. Conducting the Hearing
¶ 3128. Judgment

5. Appeal
¶ 3151. Appeal from Adverse Determination
¶ 3152. Certiorari

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6. Special Problems

¶3176. Special Problems –– Exhaustion of Administrative Remedies
¶3177. Special Problems –– Supplemental Petitions
¶3178. Special Problems –– Habeas Corpus After Some Time in the Military
¶3179. Special Problems –– Habeas Corpus to Review Denial of I-A-O Claim

B. Civil Actions Other than Habeas Corpus

¶3501. Outline of Available Civil Remedies
¶3502. What is Preinduction Review? –– When to Attempt It

1. Jurisdiction

¶3526. Jurisdiction –– Federal Question –– 28 U.S.C. § 1331 –– Jurisdictional Amount
¶3527. Jurisdiction –– Mandamus –– 28 U.S.C. § 1361
¶3528. Jurisdiction –– Certain Actions Under Color of State Law –– 42 U.S.C. § 1983
¶3529. Jurisdiction –– Freedom of Information Act
¶3530. Jurisdiction Limited –– § 10(b)(3) of the Military Selective Service Act
¶3531. Jurisdiction Declined –– Failure to Exhaust Administrative Remedies

2. Procedural Devices

¶3551. Procedural Devices

3. Venue

¶3576. Venue

4. Parties

¶3601. Parties Plaintiff –– Registrant, Employer, Dependent –– Class Actions
¶3602. Parties Defendant

5. Pleading and Practice

¶3626. Filing Complaint –– Proceeding In Forma Pauperis
¶3627. Provisional Relief
¶3628. Motion to Convene Three-Judge Court
¶3629. Government's Responsive Pleading –– Motions
¶3630. Government's Responsive Pleading –– Answer
¶3631. Discovery

6. Trial or Hearing

¶3651. Disposition of the Case –– Judgment on the Pleadings
¶3652. Disposition of the Case –– Summary Judgment
¶3653. Disposition of the Case –– Trial on the Merits
¶3654. Judgment

7. Appeal

¶3676. Appeal –– Generally
¶3677. Review by Extraordinary Writ
¶3678. Review of Denial of Provisional Relief
¶3679. Certiorari

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I. INTRODUCTION TO SELECTIVE SERVICE

A. Scope Note

¶1. Scope Note

This part (Part I) discusses the statutory and regulatory basis for Selective Service, and the personnel of the Selective Service System. Part II discusses all stages of the administrative process from initial registration and classification through induction or the order to report for civilian work. Part III discusses criminal penalties and prosecutions under the Military Selective Service Act.[1] Civil litigation designed to correct allegedly erroneous board action or to secure the release of those illegally inducted through habeas corpus is the subject of Part IV. Certain problems of military law are discussed in Part V.

Part I is divided into three major subdivisions: ¶¶ 2-30 discuss the Military Selective Service Act of 1967 and its predecessors, providing a general outline of the organization and operation of the Selective Service System; ¶¶ 31-35 discuss the formal and informal regulatory material issued under the Act by the President, the Director of Selective Service and subordinate officials such as the State Directors; and ¶¶ 36-47 describe the personnel of the Selective Service System, from the President to the local board, and auxiliary personnel such as medical advisors and government appeal agents.

1. Criminal penalties are briefly discussed in the outline of the Act, at ¶¶ 25-26 *infra.*

B. Historical Background

¶2. The Historical Background of Conscription

There are two historical threads to the law of conscription, that tracing to the biblical *levee en masse* for the defense of the Israelites, and that tracing to the poor laws of England, which provided compulsory service as punishment for the status crime of vagrancy or vagabondage.[1] It is outside the scope of this Manual to dwell more than briefly upon this history, but one should note that American courts have traditionally upheld the Selective Service laws under the "*levee en masse*" or "reciprocal obligation of citizenship" rationale,[2] rejecting the contention that conscription is punitive. This does not mean that all applications of conscription in the United States can be made nonpunitive by the ritual incantation of "reciprocal obligation", but rather that one may argue by historical analogy that punitive uses of the System distort its purposes and perhaps render it subject to constitutional infirmity.[3]

Under the English vagrancy statutes, as brought to full expression under the Elizabethan poor laws, "rogues, vagabonds, and sturdy beggers" were subject to punishment.[4] By a statute of 1703, they were to be impressed into "Her Majesties Service at Sea."[5]

The American Civil War conscription legislation permitted draftees to purchase release from service by payment of a bounty, and thus in actual operation carried this Elizabethan practice forward into American law.[6] It was "the rich man's money and the poor man's blood." Even today, such draft law features as student deferments are challenged upon the ground that they permit those with the means to go on to college

1. The official history of conscription recognizes only the former thread. Selective Service System, Backgrounds of Selective Service (2 vols. 1947) (part of a series of Special Monographs published by the System, now out of print but available in large libraries.) For a shorter summary, see Hershey, Outline of Historical Backgrounds of Selective Service and Chronology (rev. ed. 1965), available from the SSS National office. For a more complete citation of authority, see Griffiths, *Punitive Reclassification of Registrants Who Turn In Their Draft Cards,* 1 SSLR 4001, 4004 n.24 (1968). See the bibliography in section 6 of the Reporter, under the heading "Legislative History." As to the Israelites, see Numbers 1:12.

2. *E.g.,* Selective Draft Law Cases, 245 U.S. 366 (1918); United States v. Capson, 347 F.2d 959 (CA 10), *cert. denied,* 382 U.S. 911 (1965).

3. Griffiths, note 1 *supra,* argues that if the System is used punitively, then its failure to accord procedural rights customarily afforded those subjected to punishment is no longer justifiable. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

4. The Elizabethan poor laws, 39 Eliz. 1, c. 3 & 4 (1957); 43 Eliz. 1, c. 2 (1601) had a long history in the English law of vagrancy and vagabondage. See 3 Stephen, History of the Criminal Law of England 266-75 (1883); tenBroek, *California's Dual System of Family Law; Its Orgin, Development, and Present Status* (pt. 1), 16 Stan. L. Rev. 257, 258-79 (1964); Rosenheim, *Vagrancy Concepts in Welfare Law,* 54 Calif. L. Rev. 511, 511-17 (1966). The limitation to "sturdy beggers" traces to Richard II, 12 Rich. 2, c. 3 (1388), by which "beggars impotent to serve" were permitted to beg undisturbed for alms.

5. 2 & 3 Anne, c. 6, § 16(1703).

6. *E.g.,* Act of March 3, 1863, § 13, set forth in Backgrounds of Selective Service, *supra* note 1, at 132. The government guaranteed to provide a substitute for a draftee who could not find his own, for a payment not to exceed $300. *See, e.g., id.* at 65-57, for indications that the practice may have contributed to the draft riots by those unable to purchase release from service. It was, in the words of General Hershey, "the rich man's money and the poor man's blood." Hershey, *supra* note 1, at 5.

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to enjoy an exemption from service, while those too poor to go are drafted.[7] The presence in the draft law of economic discriminations echoing those of the Elizabethan poor laws may be subject to challenge upon the same basis as, for example, welfare law practices tracing to the Elizabethan despisal of the destitute and vagabond. Contemporary welfare law has been criticized in law journals as a "dual system" applying a different set of legal rules to the poor than are applied to the rest of society.[8] These analyses conclude that the "dual system of law" which welfare practices establish amounts to an irrational classification under the due process clause and to a forbidden economic discrimination under the equal protection clause.[9] Whether this analysis of welfare law has cogency in the field of selective service, and whether it may be successfully used to challenge selective service classification practices, awaits further research and litigation and is necessarily speculative at this point.

Conscription's other thread really begins in the post-Revolutionary militia, the Continental Congress having recommended that a sizeable body of men be kept under arms by each state.[10] The early Civil War conscription system rested upon the body of state conscription laws, and the 1862 conscription law called for the states to deliver a specified number of men into national service.[11] The 1863 law, however, established for the first time, a fully federal conscription system in which draft calls were to be made by the President.[12] In all, a quarter of a million men were drafted under the act, although far fewer than that were delivered into the armed forces.[13] The Confederacy, too, established a system of conscription.[14]

In 1917, the Congress moved to raise a conscript army for World War I, roughly in the manner of the present system.[15] In the 1917 Act local draft boards, with power to grant deferments and exemptions, were first created.[16] The power of the President to make rules and regulations first appears in the 1917 Act, and bounty and substitute service were prohibited.[17] The 1917 Act provided that a registrant was in the military automatically as of the date mentioned in his order to report. Thus his contumacy or refusal to report was punishable by court martial, reviewable only by habeas corpus.[18]

The 1940 Act[19] has been the model for all subsequent legislation. The local board structure, the outlines of the present induction system, the structure of statutory deferments, the definition of crimes under the Act and against the Selective Service System – all these features are quite like those now found in the Military Selective Service Act of 1967. After a hiatus in 1947-48, conscription was reinstituted in 1948 in substantially its present form.[20] 1951 legislation providing for universal military training, though it remains a part of the Act, has not been implemented by Congress and the President.[21]

The debate over the draft in 1966 and 1967, preceding the passage of the Military Selective Service Act of 1967, is reflected in many official documents, relevant portions of which are cited and discussed throughout this Manual.[22]

7. Talmanson v. United States, 386 F.2d 811 (CA1 1967), *cert. denied* U.S. (1968), held that a registrant with only a high school education was without standing to challenge the college II-S deferment as founded upon economic discrimination. The Congress in 1967 rejected proposals to end student deferments, and the House Armed Services Committee explicitly rejected the argument that such deferments are a form of economic discrimination. H. Rep. No. 267, 90th Cong., 1st Sess., at 22-27 (1967). The Marshall Commission on the draft was deeply split over the question. National Advisory Commission on Selective Service, In Pursuit of Equity: Who Serves When Not All Serve? 37-46 (1967). With respect to other alleged inequities, see *id.* at 9-10, 19-26.

8. The law journal arguments are made principally in tenBroek, *supra* note 4, and parts 2 and 3 of the same article, 16 Stan. L. Rev. 900 (1964) and 17 Stan. L. Rev. 614 (1965), and in works relying on tenBroek, such as Rosenheim, *supra* note 4, and Weyrauch, *Dual Systems of Family Law: A Comment,* 54 Calif. L. Rev. 781 (1966). They relate to the division into two classes of those on welfare and those not, and the differential allocation of rights as between the two groups, in such matters as privacy, freedom from unreasonable search and self-incrimination. In the judicial field, see Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966), holding that payment of a poll tax cannot be made a condition of voting.

9. On the relation of equal protection of the laws under the fourteenth amendment to federal statutes challenged under the fifth amendment, *see, e.g.* Bolling v. Sharpe, 347 U.S. 497 (1954).

10. Hershey, *supra* note 1, at 2.

11. Selective Service System, *supra* note 1, at 126-28, setting forth the Act of July 17, 1862. See also Seeger v. United States, 380 U.S. 163, 170-71 (1965).

12. Selective Service System, *supra* note 1, at 129-36, setting forth the Act of March 3, 1863, 12 Stat. 379.

13. Annot., 129 A.L.R. 1171, 1172 (1940).

14. Hershey, *supra* note 1, at 5-6; Jeffers v. Fair, 33 Ga. 347 (1862); Parker v. Kaughman, 34 Ga. 136 (1865) (draft law constitutional under Confederate constitution); Burroughs v. Peyton, 16 Gratt. (Va.) 470 (1864).

15. Act of May 18, 1917, 40 Stat. 76. The draft acts beginning with this one and ending with the 1965 legislation are compiled in The Selective Service Act as Amended (Udell comp. 1966), available from the Supt. of Documents. Cases arising under the 1917 Act are collected in Annot., 129 A.L.R. 1171 (1940).

16. §4.

17. §§ 3,4.

18. See Annot., 129 A.L.R. 1171, 1198-1200 (1940).

19. Act of Sept. 16, 1940, 54 Stat. 885, codified to 50 U.S.C. App. §§ 301-318 (repealed). Cases arising under the Act are collected in Annots., 147 A.L.R. 1313, 148 A.L.R. 1313, 149 A.L.R. 1457, 150 A.L.R. 1420, 151 A.L.R. 1456, 152 A.L.R. 1452, 153 A.L.R. 1422, 154 A.L.R. 1448, 155 A.L.R. 1452, 156 A.L.R. 1450, 157 A.L.R. 1450, 158 A.L.R. 1450.

20. During the hiatus, the Office of Selective Service Records was formed to liquidate the System and provide for storage of its records. Act of Mar. 31, 1947, 61 Stat. 31, codified to 50 U.S.C. App. §§ 321-329 (repealed). The 1948 revival of the draft was by means of the Selective Service Act of 1948, 62 Stat. 604. For the history, see Hershey, *supra* note 1.

21. Universal Military Training and Service Act § 1, 65 Stat. 77, now chiefly in Military Selective Service Act of 1967, § 4(k).

22. *E.g.*, Hearings Before the House Armed Services Committee, 90th Cong., 1st Sess. 1913-2917 (1967); National Advisory Commission on Selective Service, *supra* note 7; Civilian Advisory Panel on Military Manpower Procurement, Report to the Committee on Armed Services, 90th Cong., 1st Sess., February 28, 1967 (committee print).

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¶ 3. Constitutionality of Conscription

The administration and enforcement of the Act raises constitutional problems which are dealt with at appropriate places in this Manual. However, many courts have had occasion to consider the constitutionality of drafting men into the armed forces or alternative service as a general proposition. Conscription has been upheld in a line of cases beginning with those arising from Civil War draft legislation both North and South.[1] The Selective Draft Law of 1917 was upheld by the Supreme Court in the Selective Draft Law Cases,[2] as against contentions that the 1917 Act authorized an exaction of liberty or property without due process, that conscription was involuntary servitude, that the Act improperly delegated legislative, executive and judicial power, and that the right to raise armies is limited to executing the laws of the United States, suppressing insurrection or repelling invasion. In upholding the World War I draft law, the Court relied upon the war powers of Congress; the emergency character of the legislation in question was apparent from its face.[3] Peacetime conscription has been upheld by courts of appeals,[4] but the Supreme Court has never confronted the issue directly.

The power of the Congress to call all citizens to military service has been asserted as an overarching principle of law in a number of cases,[5] and this "greater power" has been said to support lesser exercises of power without regard to the manner of the exercise.[6] The constitutional and logical validity of such arguments is questionable.[7] Assuming that Congress could, if it wished, call everyone to the colors, it has not done so.[8] It has been held, therefore, that classification of who shall serve and who shall not must be reasonable and nondiscriminatory,[9] and the process by which classification is accomplished must not offend due process.[10] Beyond the substantive and procedural prerequisites to the validity of any given exaction, questions arise concerning the nature of the service to be rendered. Congress could not conscript for service of

1. These cases include those cited and discussed in the footnotes to ¶ 2. See also United States v. Tarble, 80 U.S. (13 Wall.) 397, 407 (1871) (dictum); *In re* Grimley, 137 U.S. 147, 153 (1890) (dictum). All the major 19th century cases are collected in Annot., 129 A.L.R. 1171, 1172-81 (1940). See also Bernstein, Conscription and the Constitution, 53 A.B.A.J. 708 (1967).

The most compendious collection of constitutional arguments is to be found in the many opinions of the justices in Kneedler v. Lane, 45 Pa.St. 238 (1863), *vacated and motion for injunction overruled,* 45 Pa.St. 295 (1864). In that case, the court enjoined induction of the plaintiffs by a vote of 3 to 2, upon the ground that the Act of 1863 was unconstitutional. The majority reasoned that the Congress' power was limited to calling forth the militia under state control, or to raising armies through voluntary enlistment. The power to conscript being nowhere expressly granted, and the Constitution appearing to contemplate total national mobilization only by calling up the militia to "repel Invasion", the majority thought the power to conscript did not lie with the federal government. In an election held in the fall of 1863, the Chief Justice, who had voted for the injunction, was defeated for reelection, and his successor cast the deciding vote for dissolution of the injunctions.

2. 245 U.S. 366 (1918), and a host of related cases based upon the same reasoning and cited in Annot., 129 A.L.R. 1171, 1173 (1940). The premises of the decision are examined from a critical stance in Holzer, *The Constitution and the Draft,* The Objectivist, Oct. 1967 & Nov. 1967.

3. The Act begins "That in view of the existing emergency..." and is replete with limitations of the powers granted to the President to the period of the "emergency." 40 Stat. 76. *The Selective Draft Law Cases* proceed from the premise that at least in a "war declared by the great representative body of the people" the Congressional power to raise armies extends to the power to conscript. 245 U.S. at 377. The Court's other argument for the existence of a "supreme and noble duty" to fight lies in the proposition that since the Congress has the power to raise armies, the means by which it does so are subject to very limited judicial review if any at all. Such an approach does omit to consider whether Congress might have raised an army by other means less drastic in their interference with personal liberty, an inquiry suggested in a similar context by the Supreme Court in United States v. Robel, 389 U.S. 253 (1967). *But see* United States v. Butler, 389 F.2d 172, 1 SSLR 3071 (CA6), *cert. denied,* U.S. (1968).

4. United States v. Henderson, 180 F.2d 711 (CA 7), *cert. denied,* 339 U.S. 963 (1950). Some cases decided under the 1940 Act prior to the outbreak of declared war support the constitutionality of peacetime conscription with extensive discussion of constitutional and legal history. Thus, United States v. Garst, 39 F.Supp. 367 (E.D. Pa. 1941), relied upon the rejection by the Constitutional Convention of 1787 of a proposed Rhode Island amendment which would have forbidden conscription in peacetime, and upon Hamilton's explicit statement in Federalist No. 24 that the power to raise armies was deliberately separated from the power to declare war, in order that the government would be able to prepare to defend against an imminent invasion by "levies of men." *Id.* at 368. See also United States v. Herling, 120 F.2d 236 (CA2 1941); United States v. Lambert, 123 F.2d 395 (CA3 1941); and, more recently, United States v. Hogans, 369 F.2d 359 (CA2 1966).

5. *E.g.,* Kramer v. United States, 147 F.2d 756 (CA2), *cert. denied,* 324 U.S. 878 (1954).

6. *Id.*

7. For a general survey, see Linde, *Justice Douglas on Freedom in the Welfare State: Constitutional Rights in the Public Sector,* 39 Wash. L. Rev. 4, 31-32 (1964). Half a century ago, Thomas Reed Powell noted that there is no logical reason why the power to condition benefits upon any ground whatever should be comprehended within the power to deny them absolutely. Powell, *The Right to Work for the State,* 16 Colum. L. Rev. 99, 110-12 (1916), discussed in O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached,* 54 Calif. L. Rev. 443, 461 (1966). The unconstitutional conditions argument was rejected in the context of conscientious objector civilian public service camps in United States v. Steinel, 70 F.Supp. 966 (D. Conn. 1946). For further discussion see ¶¶ 1034-48 *infra.*

8. The Supreme Court brushed aside a "greater-includes-the-less" argument upon this very ground in United States v. Romano, 382 U.S. 136, 144 (1966), when the government sought to uphold a statutory presumption that presence at an illegal still was presumptive evidence of ownership upon the ground that Congress might, if it wished, make mere presence a crime.

9. United States v. Seeger, 326 F.2d 846 (CA2 1964), *affirmed on other grounds,* 380 U.S. 163 (1965), held that the "Supreme Being" clause of the then-extant §6(j) arbitrarily and irrationally distinguished between internally-derived and externally-compelled beliefs and was therefore void under the due process clause of the fifth amendment. See the discussion of conscientious objection ¶¶ 1034-48 *infra.*

10. *E.g.,* Olvera v. United States, 223 F.2d 880 (CA5 1955) (board refusal to reopen registrant's classification arbitrary and therefore violated due process, invalidating board action). *Olvera* is rich in due process discussion and dicta.

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any kind,[11] although the limits of its powers have never been clearly marked.

11. Serious doubt would be raised as to the constitutionality, under the thirteenth amendment, of conscription for work in private employ, United States v. Copeland, 126 F. Supp. 734 (D. Conn. 1955) (assigning conscientious objector against his will to a private employer invalid), at least in peacetime. *But see, e.g.,* United States v. Hoepker, 223 F.2d 921 (CA7), *cert. denied,* 350 U.S. 841 (1955), rejecting *Copeland.*

D. *Outline of the Military Selective Service Act*

¶4. The Act Generally

The military Selective Service Act creates duties and rights in two ways: First, it specifically regulates a number of areas of Selective Service procedure and establishes detailed substantive standards;[1] second, it gives the President and his designees the power to make regulations and to subdelegate or authorize the subdelegation of this power.[2] The difference between a statutorily-created right such as the right to a II-S deferment upon proper showing or to the conscientious objector classifications (I-O and I-A-O),[3] and a right granted by regulation such as that to a II-A or III-A classification, for which the President is merely "authorized" to provide,[4] is important. First, the statutory grant will prevail over any regulatory derogation from it.[5] Second, it must be taken that Congress is conscious of its constitutional prerogative in the raising of armies,[6] and a legislative judgment on policy, procurement or exemption must be accorded weight. The importance of careful reading and imaginative use of the Act's provisions cannot be too much stressed. The purpose of the following summary is to acquaint the practitioner with the structure of the Act, and where appropriate, with constructional problems raised by its language. The discussion should be read in conjunction with that of specific topics in Parts II, III, IV and V of the Manual. Also, it will be noted that the Act dovetails with other provisions concerning the Armed Forces, most of which are codified to titles 10 and 50 App. of the United States Code.

1. *E.g.,* the system of autonomous local boards is minutely provided for in §10(b)(3). The distinction between statutory and regulatory provisions may be important in determining the availability of judicial review of board action. See Oestereich v. Selective Service, 1 SSLR 3027, 3028 (1968).

2. §10(b)(1) gives the President the power to make rules; §10(c) authorizes delegation of any authority vested in the President. R1604.1(a) empowers the Director to make rules, and was held valid in Savoretti v. Small, 244 F.2d 292 (CA5 1957). And see Billings v. Truesdell, 321 U.S. 542, 552 (1944). A number of Executive Orders delegate other Presidential powers to the Secretary of Defense. *E.g.,* E.O. 10776, 23 Fed. Reg. 5683 (1958), providing for delegation of power to modify the standards for induction provided in §4(a).

3. *E.g.,* Quaid v. United States, 386 F.2d 25 (CA10 1967), holding R1631.8(a) (providing for mandatory induction of delinquent reservist) invalid as applied to a conscientious objector. The court noted that §6(c)(2)(D) provides only that a delinquent reservist "may" be ordered to priority induction, while "the emphatic, imperative provision of [§6(j) is] . . . that a conscientious objector shall not be required to serve in the armed forces." *Id.* at 29.

4. The authorization is contained in §6(h)(2). It has been used to change, from time to time, the requirements for deferments. *E.g.,* Klubnikin v. United States, 227 F.2d 87 (CA 9), *cert. denied* 350 U.S. 975 (1956) (nonretroactive change in regulations to provide that only extreme hardship as a basis for III-A is valid).

5. Quaid v. United States, note 3 *supra.*

6. H.Rep. No. 346, 90th Cong., 1st Sess., at 10 (1967) (Conference Report on 1967 Act), said in justifying refusal to grant the President discretionary authority to institute a random system of selection, "[T]he Congress . . . has the unique constitutional responsibility of 'raising armies'. . . ."

¶5. Sec. 1 –– Citation and Policy

Subsection (a) gives the customary citation of the Act, the "Military Selective Service Act of 1967".[1]

After an introductory declaration that an adequate armed force is necessary to national security, the Act states the Congress's intent that the selection system be "fair and just",[2] and "consistent with the maintenance of an effective national economy."[3] In a related vein, §1(e) declares that national security demands effective use of scientific and technological manpower resources.[4] §1(c) affirms Congressional support for the National Guard, and calls for balanced use of Reserve units and National Guard units in the event of a callup. This language is merely precatory in tone, but congressional intent in its constitutional sphere of raising armies must be given weight.[5]

1. The 1967 Selective Service amendments, P.L. 90-40, 81 Stat. 100, amended § 1 in only one particular, to change the way in which the *entire* Act was to be cited. Thus, a citation to the Military Selective Service Act of 1967 is, properly speaking, a citation to the entire Act, as amended in 1967, and not merely to the 1967 amendments.

2. In the Selective Service case of Gonzales v. United States, 348 U.S. 407, 412 (1955), the Court said that the draft laws, like all Acts of Congress, are to be construed in the light of "our underlying concepts of . . . basic fair play."

3. The System itself sees its function as allocating occupational priorities for those between 18 and 35, the "channelling" function. The Selective Service System: Its Concept, History and Operation 27-29 (1967 ed.). The pressures exerted upon registrants who wish to obtain deferment or exemption result in "procurement of manpower for civilian activities which are manifestly in the national interest." *Id.* at 27.

4. This declaration of policy underlies occupational deferments, and may be cited as Congressional support for these deferments. See H.R. Rep. No. 267, 90th Cong., 1st Sess., at 29 (1967).

5. See ¶4 n.6.

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¶6. Sec. 2 — Size of Force (repealed)

Section 2 dealt with size of the armed forces. It was repealed in part by PL 84-1028, §53, 70A Stat. 641, and portions of it recodified to 10 USC §§3201, 8201.[1]

1. Armed forces strength limitations under the section as recodified remain suspended until July 1, 1971, as a part of the 1967 amendments. See H.R. Rep. No. 267, 90th Cong., 1st Sess., at 38 (1967).

¶7. Sec. 3 — Duty to Register

Section 3 establishes the duty of all males in the United States, between 18 and 26, except those exempted as provided in the Act, to register at times and places fixed by Presidential proclamation and regulations made under the Act.[1] The registration requirement has been held constitutional,[2] although a registrant would perhaps be entitled to withhold potentially incriminatory information.[3] For a complete survey of registration obligations, see ¶1007 *infra.*

1. Males in medical, dental and allied specialist categories are liable for registration to 35. §6(a). See ¶¶14, 1071.1, 1128, *infra.* The term "duty" has reference to the criminal prosecution provisions of §12, proscribing failure to carry out any duty required to be performed under the Act.

2. *E.g.,* Richter v. United States, 181 F.2d 591 (CA 9), *cert. denied*, 340 U.S. 892 (1950), *affirming* 83 F.Supp. 986 (S.D. Calif. 1949) (registration upheld against claim of denial of religious freedom; peacetime registration valid as ancillary to power to raise armies). *Cf.* Stone v. Christensen, 36 F. Supp. 739 (D.Or. 1940) (dictum: claim that registration is unconstitutional states insubstantial federal question).

3. *Compare* Albertson v. SACB, 382 U.S. 70 (1965); Marchetti v. United States, 390 U.S. 39 (1968).

¶8. Sec. 4(a) — Qualifications, Induction, Training

Section 4(a) provides that every male citizen and every alien admitted for permanent residence is, from the time he is 18½ until he is 26,[1] liable for training and service in the Armed Forces.[2] Aliens not admitted for permanent residence who have remained in the United States for a period totalling one year, and who are not otherwise exempt, see ¶1007 *infra,* are also liable for induction, but may be relieved of this liability upon application. Aliens who make such an application are forever barred from becoming citizens of the United States.[3]

Section 4(a) also gives the President the authority to induct under the Act, including the power to induct by age group or age groups.[4] Inductees are assigned to a given service – Army, Air Force, Navy, Marine Corps – and are for the period of their service members of that service with the same rights and duties as enlistees.[5]

Section 4(a) provides for classification and examination of each registrant after he is registered. The Secretary of Defense is authorized to prescribe minimum physical fitness standards, which shall not be higher than those applied to inductees between 19 and 26 in January 1945.[6] In fact, the standards now applied, as set out in AR 40-501, the pertinent portions of which are reproduced in SSLR's *Statutes & Regulatory Material* section, are higher than the 1945 standards. As to mental qualification, the statute provides that a passing score on the Armed Forces Qualification Test (mental examination) shall be 10 points. The President may, except in time of war or national emergency, modify the minimum physical or mental standards.[7] Section 4(a) mandatorily provides that "no person shall be inducted . . . until his acceptability in all respects, including his physical and mental fitness, has been satisfactorily determined."

1. Except as otherwise provided in the Act. Those deferred under §6 obtain extended liability to age 35, §6(h)(2), LBM 38, as do doctors, dentists and allied medical specialists, §6(a)(1), by virtue of a provision added in 1967 to permit induction of alien doctors who came to the United States after the age of 26. H.R. Rep. No. 267, 90th Cong., 1st Sess., at 44 (1967). But no doctor, dentist or allied medical specialist who applies for a Reserve Commission and is turned down solely for physical disqualification may be inducted. §4(a). See ¶¶14, 1071.1, 1128, *infra.*

2. Many classes of aliens are exempt under §6(a) or R1611.2 (implementing §6(a) and certain treaty obligations of the United States) either from registration and service or from service alone. See ¶¶1007, 1064, *infra.*

3. If an alien signs the application for exemption from service without full understanding of the consequences, he may be relieved from the operation of this provision, and the cognate provision of 8 U.S.C. §1426 (1964) which provides that one who asks for and receives exemption shall be ineligible for citizenship. *In re* Planas, 152 F.Supp 456 (D.N.J. 1957) (alien signed only after assurance, from local board, that he could be exempt from service and still become a citizen); *In re* Husney, 140 F. Supp. 503 (E.D.N.Y. 1956), *affirmed*, 254 F.2d 958 (1958) (semble; dictum); *Cf.* Prieto v. United States, 289 F.2d 12 (CA5 1961) (alien who claimed he executed form at age 19 against his will because of mother's urging barred from citizenship). But the alien must not only have applied for the exemption but have actually received it. Ceballos v. Shaughnessy, 352 U.S. 599, 606 (1957). If an alien is erroneously classified as exempt, though as a permanent resident he is actually in the same class as citizens, he is not debarred from citizenship. Petition of Rego, 289 F.2d 174 (CA3 1961). *Cf.* Lapenieks v. I & NS, 389 F.2d 343, 1 SSLR (CA9 1968).

4. See ¶1122 *infra,* for discussion of the President's authority to induct by age groups.

5. They recieve the same pay as enlistees of like grade. §4(e).

6. The Secretary's determinations are issued in the form of Army Regulations, although they apply to all the services. See R1628.1.

7. This power has been delegated to the Secretary of Defense. Exec. Order No. 10776, 23 Fed. Reg. 5683 (1958).

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Section 4(a) provides for "full and adequate training" for not less than four months, and prohibits assignment of inductees outside the United States, its territories and possessions until the training period is completed.[8] Finally, it provides that no funds appropriated by the Congress shall be expended for transporting any person on active duty in the Armed Forces in violation of its provisions.

8. Here is all that survives of the common law right to remain "within the realm," which is superceded by operation of the conscription laws, Story v. Perkins, 243 Fed. 997 (D.Ga. 1917), *aff'd sub nom.* Jones v. Perkins, 245 U.S. 390 (1918), and is within the power of the Executive to override even in the absence of conscription. Fleming v. Page, 50 U.S. (9 How.) 603, (1850) (dictum). The question whether an inductee may litigate the adequacy or length of his training through habeas corpus, or in defense of a court martial for refusal to obey an order to proceed to a foreign land, appears not to have been presented for judicial decision. The statute appears to be mandatory, and to afford a basis for judicial relief.

¶8.1. Liability Beyond Age Limit –– Refusal to "Report"

The last paragraph of §4(a) says that, unless otherwise provided in the Act, no person over 26 may be inducted without his consent. Extended liability to age 28 or 35 is provided for elsewhere in the Act, as noted in ¶8 *supra* and ¶1071 *infra.* A 1967 amendment, §4(a) adds that "notwithstanding any other provision of law, any registrant who has failed or refused to report for induction shall continue to remain liable for induction and when available shall be immediately inducted." The House Report states the intention of the amendment's sponsor: "At the present time it is possible for a registrant who wishes to evade possible military service to engage in prolonged litigation in the courts until he has passed his 26th birth date and thereby no longer is liable for military service. The committee believes that this technical shortcoming in the law requires correction and consequently has included language in the bill which will accomplish this objective. The language would ensure that a registrant who prolongs litigation of his draft classification beyond age 26 would nonetheless remain liable for induction, regardless of age, if he is later found qualified for induction."[1]

Read literally, the language of the Act visits its consequences – whatever they may be – upon only those who fail or refuse to "report" for induction. Failure to report for induction, as distinguished from refusal to submit after having reported, has a well-defined technical meaning, since reporting and taking all the steps up to the order to step forward is usually prerequisite to raising defenses in a criminal prosecution based upon irregularities in the classification and selection process.[2]

If the continuous liability for induction attaches only to one who refuses to report for induction, the statute merely codifies R1642.15, which is to the same effect, and makes clear that an outstanding *valid* order of induction does not cease to be valid because the registrant turns 26.

A slightly broader reading is possible, however. It may be that even if an induction order is cancelled for some reason, or if a prosecution results in acquittal, dismissal or some other holding that the order to report was invalid, the statute might authorize induction of the registrant based upon procedures which conformed to the normal selection process in every respect save one: The board would ignore the registrant's age. This reading does violence to the statutory language "immediately inducted," which appears to contemplate that no act would remain to be done but the actual induction. Clearly a judicial invalidation of the order to report would require more than that to accomplish induction, so the amendment would more logically be limited to the reading first suggested.

There is a third reading. The amendment could be read to provide that one who refuses to submit to induction – by failure to report or refusal to step forward – incurs the statutory consequences under the reading first suggested, which are induction under a judicially-validated order, or, under the second possible reading, reprocessing by Selective Service looking to induction. This reading ignores the technical word "report", and is therefore not to be favored. If this reading *is* taken, then only those registrants whose refusals to submit to induction are found by the courts to have been unwarranted should be subjected to the section's provisions. For if the prosecution of a registrant results in his acquittal, or in the dismissal of the indictment, there is generally a necessary inference that the order to report for induction was invalid and need not have been complied with. If the section were construed otherwise, it would permit induction of a registrant under an invalid induction order, or, in the alternative, it would penalize a registrant who successfully challenged the System's right to call him for service and permit the System to undo what the judgment of acquittal necessarily decreed.

Finally, the amendment has an impact quite apart from the question of inducting those over 26. The Selective Service System, for example in its newsletter *Selective Service,*[3] regards the amendment as providing for induction of those who have served prison terms for refusals to "comply with" an order to report for induction. Thus, if a registrant is convicted for noncompliance, induction awaits him upon his release from prison. The System's use of "comply with" instead of either "refuse to report" or "refuse to submit" begs the question whether the statute applies in the latter case. The argument above strongly indicates that in-

1. H.R. Rep. No. 267, 90th Cong., 1st Sess., at 30 (1967).
2. Estep v. United States, 327 U.S. 114 (1946).
3. Selective Service, April 1968, p.4, col. 1.

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duction should not be visited upon one who has refused to submit (after having reported), but only upon one who has refused to report. Note also that the provision does not by its terms apply to disobedience of an order to report for civilian work.

¶9. Secs. 4(b), 4(k) —Length of Service, Reduction of Service, National Security Training Corps

The basic active duty obligation of an inductee is 24 consecutive months. This is a minimum period, subject to extension. The subsection directs the Secretaries of Army, Navy and Air Force to provide by regulation for lesser periods of service for those volunteering for and accepted into National guard units and other reserve components. However, §4(k)(1) provides for Presidential or congressional reduction or elimination of the period of service under the Act. The President, upon a finding that the strength of the armed forces in the light of international conditions warrants, may provide for reduction or elimination of the period of required service, but the period of service may not be less than "can be economically utilized." The Congress may take the same action by concurrent resolution. The decrease must be uniform, except that the service requirement for different age groups need not be uniformly reduced. If the period of service is reduced or eliminated, all persons then or thereafter liable for registration who have not, at the time of the reduction, reached the age of 19 and have not yet been inducted will be liable for induction into the National Security Training Corps for 6 months of initial military training. There is little present prospect of either a reduced period of service or of executive and congressional implementation of the NSTC provisions.

The balance of §4(k) deals with the National Security Training Corps, its initiation and operation. The NSTC has not been established, and is therefore not considered in this Manual. In theory, it was to have been an instrument of universal military training, but the UMT concept has been departed from in both the theory and practice of conscription in the United States.[1]

1. The Civilian Advisory Panel on Military Manpower Procurement, in its Report to the House Committee on Armed Services, 90th Cong., 1st Sess. (committee print), noted the selective rather than universal character of the draft law as currently operated, and explicitly rejected universal military training as too expensive, too impractical, and conducive to public opposition to maintenance of the "mammoth training base" that would be necessary. Pp. 10, 17. The Congress apparently concurred with these views, and reflected its concurrence in changing the title of the law from Universal Military Training and Service Law to Military Selective Service Act of 1967. See H.R. Rep. No. 346, 90th Cong., 1st Sess., at 8 (1967).

¶10. Sec. 4(c) — Volunteers, Enlistees

Most of §4(c) provides for enlistments and to that extent is outside the scope of this Manual. Relevant for purposes of this Manual are §4(c)(2), which provides a deferment from induction for one who was on June 25, 1950, a member of an active reserve component and continues to serve satisfactorily, and has applied for active duty.

§4(c)(3) provides that one between 18 and 26 may volunteer for induction, within the limits of the quota for his geographical area, but he shall not be inducted if he is "deferred after classification." See R1630.4. Of course, without regard to his classification, any person otherwise qualified may enlist without going through the procedure of volunteering for induction.

§4(c)(4) provides that a 17-year-old, with parental approval and within the limits of the quota for his area, may volunteer for induction.[1] See ¶1123 *infra.*

1. However, §6(1) forbids the discharge, for lack of parental consent to his entrance into service, of any person between the ages of 18 and 21. Generally, therefore, if a 17-year-old enlists without parental consent and the oversight is discovered only after he reaches 18, he may not be discharged. See AR 635-200, c.7, relating to minority discharge. §6(1) may also be read to override state laws relating to majority. See United States *ex rel.* Goodman v. Hearn, 153 F.2d 186 (CA5), *cert. dismissed,* 329 U.S. 667 (1946).

¶11. Sec. 4(d) — Transfer to Reserves, Length of Obligation

Section 4(d) is in three subparts two of which apply only to those inducted on or before June 19, 1951, and the last of which applies only to those inducted after June 19, 1951 and on or before August 9, 1955. These three subsections set out the reserve obligations of persons in these classes. The reserve obligation of one who is inducted after August 9, 1955, is set forth in 10 U.S.C. §651, which provides for a total military obligation of six years. Read in conjunction with §4(b), this provision entails four years of reserve duty for an inductee after completion of his two-year active duty obligation.[1]

1. See also 10 U.S.C. §§270-72, concerning ready reserve training and drill obligations.

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¶12. Sec. 4(f) -- Compensation from Civilian Employer

Section 4(f) expressly permits one who has been receiving compensation from any person prior to his induction, to continue to receive compensation from that person during the period of his service under that induction.[1] The section must be read as subject to applicable conflict of interest and other criminal statutes, despite its expansive introductory clause "notwithstanding any other provision of law."[2]

1. See Mickshaw v. Coca-Cola Bottling Co., 166 Pa. Super. 148, 70 A.2d 467 (1949) (promise by employer to pay difference between military pay and civilian salary valid and not abrogated by statutory extension of inductee's term of service.)

2. United States v. Corrigan, 168 F.2d 641 (CA2 1948) (under former similar provision, employee not entitled to receive salary payments when conflict of interest created thereby). A list of the conflict of interest statutes and a summary of their provisions appears as Appendix A to Part 1600 of the Selective Service regulations, reprinted in SSLR.

¶13. Sec. 4(g) -- Critical Occupations -- National Security Council

Section 4(g),[1] as the result of a 1967 amendment, directs the National Security Council to advise the Director of Selective Service concerning critical occupations, taking into consideration the needs of both the armed forces and the civilian segment of the population. This provision is intended to provide a means for making recommendations on occupational and graduate student deferments. Prior to 1967, the Departments of Labor and Commerce maintained lists, respectively, of "currently critical occupations" and "currently essential activities."[2]

1. Former §4(g), as enacted in 1948, authorized one-year enlistments for those between 18 and 19. The subsection was repealed in 1951 by §1(h) of the Act of June 19, 1951, 65 Stat. 80, along with a §4(h) prohibition on stationing 1-year enlistees outside the United States.

2. The genesis of the change was a proposal by the Clark Panel (Civilian Advisory Panel on Military Manpower) that a National Manpower Resources Board be created to recommend to the National Security Council critical occupations and essential activities to be the basis for II-A deferment. The Council would have final authority to approve occupations and activities for inclusion on the list. Civilian Advisory Panel on Military Manpower Procurement, Report to the House Committee on Armed Services, 90th Cong., 1st Sess., at 12-13 (committee print). This recommendation was followed by the Committee in its proposed bill, H.R. Rep. No. 267, 90th Cong., 1st Sess., at 28-29 (1967), and in the bill as passed by the House. No similar language was contained in the Senate bill, but the Senate conferees receded after adoption of an amendment to vest the function in the Council itself. H.R. Rep. No. 346 (conf.), 90th Cong., 1st Sess., at 9 (1967). See ¶1054 *infra* on II-A deferments.

¶14. Sections 4 and 5 -- Provisions for Induction of Doctors, Dentists and Allied Medical Specialists

The present Selective Service law provides for special selection and induction of doctors, dentists and allied medical specialists when personnel with these specialities are needed. The statutory authority for this special treatment is scattered in sections 4 and 5 of the Act, and is dealt with here in one place for ease of understanding.

First, §3 of the Act affects all registrants, including doctors, dentists, and allied medical specialists. However, §6(a)(1) provides an extended registration liability for doctors, dentists, and allied medical specialists. See ¶1007 n.7 *infra.*

Section 4(j) establishes a National Medical Advisory Committee, and provides for state and local volunteer advisory committees to advise the System on the need for and availability of medical personnel for civilian and military uses.

Section 5(a) provides, in conjunction with its discussion of selection and induction, that "nothing herein shall be construed to prohibit the President, under such rules and regulations as he may prescribe, from providing . . . for the selection or induction of persons qualified in needed medical, dental, or allied specialists categories pursuant to requisitions submitted by the Secretary of Defense."[1] This provision means that special calls may be levied for persons with needed skills.[2] The special call provisions are implemented in R1631.4, as part of the general quotas and calls provisions of the regulations. See ¶1128 *infra.*

Section 5(c) softens the impact of §5(a), for it provides that persons liable for induction or ordered for active duty as physicians, dentists or in an allied specialist cateogry must be appointed to a grade or rank commensurate with their professional ability. For a person with a doctoral degree, this means an officers commission. However, §5(c) provides that one who does not qualify for, or who does not accept, a

1. Prior to 1957, the authority for special calls was contained in provisions of law not codified to the Universal Military Trianing and Service Act. The "Doctor's Draft Act," as the law was popularly known, was enacted as P.L. 779, 81st Cong., 2d Sess., September 9, 1950, 64 Stat. 828, set forth in Udell, The Selective Service Act as Amended 116 (1966), available from the Superintendent of Documents. The Act was extended to 1953 by P.L. 51, 82nd Cong., 1st Sess., 65 Stat. 88. Further extensions to 1957 were accomplished by P.L. 84, 83rd Cong., 1st Sess., 67 Stat. 90, and by P.L. 118, 84th Cong., 1st Sess., 69 Stat. 224. The Act lapsed in 1957, and its principal constitutents were integrated into the Universal Military Training and Service Act (now the Military Selective Service Act of 1967) by P.L. 85-62, 85th Cong., 1st Sess., 71 Stat. 207. After 1957, renewals of authority for special calls were granted as the overall draft law was periodically renewed.

2. The provision for special calls was held constitutional in Bertelson v. Cooney, 213 F.2d 275 (CA5), *cert. denied,* 348 U.S. 856 (1954).

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commission, or whose commission is terminated, may be used in his professional capacity in an enlisted grade.[3]

The above sections are at the center of the System's procedure for special induction of those with medical and paramedical specialities.

3. This provision was added in 1954, 68 Stat. 254. As originally passed, the statute provided that a doctor, dentist, or allied medical specialist could, but need not, be given a commission, a provision interpreted in Orloff v. Willoughby, 348 U.S. 83 (1953), to permit use of a physician, denied a commission based on political affiliation, in an enlisted grade. The Congress amended the statute to provide that every inducted specialist "shall" be given a commission, and the Fourth Circuit held that this provision required discharge of a dentist inducted but refused a commission based on pre-induction political activity. Nelson v. Peckham, 210 F.2d 574 (CA4 1954). The Congress promptly amended the statute to its present form, 68 Stat. 254. The relevant history is set out in the *Nelson* opinion.

¶15. [Vacant]

¶16. [Vacant]

¶17. Sec. 5(a) Generally –– Selection –– Principles and Order

Section 5 provides for selection of registrants for induction, and for determination of quotas by state and local board area. Section 5(a) provides that selection must be made in an impartial manner,[1] from among those liable for service, registered, classified and not deferred or exempted, and forbids racial discrimination in the selection process and the interpretation of the entire Act.[2]

Section 5(a) also regulates the order of call, see ¶1122 *infra,* permitting the President to determine the manner and order of selection, and stating specifically that the President may provide for selection or induction "by age group or groups." This section permits an executive determination to depart from the "oldest first" order of call now operative.[3] However, by a 1967 amendment, the Congress expressly limited the authority of the President in this regard by denying him the power to change the method for determining order of call within any designated age group from that which existed as of July 1, 1967. The effect of this provision is to require Congressional approval of a random selection system.[4] The President[5] may, therefore, order 19-year-olds, for example, to be considered as the "prime age group," but may not provide for other than an "oldest first" order of selection within that age group.

Section 5(a) also provides authority for special calls for doctors, dentists and allied medical specialists. See ¶¶14-16 *supra.*

Still another proviso to §5(a) forbids each local board to select registrants under 19 unless there are not enough persons within the jurisdiction of the board who are 19 and are available for induction.

1. Subject to the provisions in §5(a) that selection may be made by age groups, and that selection need not come in the order in which the selectees registered.

2. *But see* United States *ex rel.* Lynn v. Downer, 140 F.2d 397 (CA2), *cert. denied* ("on the ground that the case is moot, it appearing that petitioner is no longer in respondent's custody"), 322 U.S. 756 (1944), upholding separate calls for Negroes and whites, a practice fallen into desuetude with the integration of the armed force and now no doubt unconstitutional. Bolling v. Sharpe, 347 U.S. 497 (1954).

3. R1631.7(a). The regulations also provide that any given monthly call by the Secretary of Defense may depart from the "oldest first" system and provide for induction by age groups. R1631.7(b). See ¶1122 *infra.*

4. See H.R. Rep. No. 346, 90th Cong., 1st Sess., at 9-10 (1967) (language of §5(a)(2) intended to prevent institution of random selection without congressional approval).

5. The President's power in this regard has been delegated to the Secretary of Defense. R1631.4

¶18. Sec. 5(b) –– Quotas

Section 5(b) provides for the setting of quotas for each state, territory, possession, and the District of Columbia when a call for induction is issued. A quota is established by taking the whole number of registrants in a given geographical subdivision who are liable for training and service and not deferred after classification, *i.e.,* who are I-A or I-A-O, and dividing that figure by the whole number of men thus available. The resulting figure is the percentage of the quota to be filled by the subdivision.[1]

In establishing quotas, credit is given for residents of each subdivision who are in the armed forces and, after quotas are established, credit is given in filling them for men who subsequently become members of the armed forces. Quotas may be based on estimates if exact figures are not available, subject to an adjustment when exact figures are known.

1. If a quota is grossly improperly allocated with the result that a registrant is called for induction sooner than he would have been under a proper allocation of quotas, and he can prove that this is the case, he may be able to obtain relief from service in the armed forces. *See generally* United States *ex rel.* Lynn v. Downer, 140 F.2d 397 (CA2), *cert. denied as moot,* 322 U.S. 756 (1944). The effect of the quota system is that areas with "tight" deferment policies and a greater proportion of I-A and I-A-O registrants will receive larger induction quotas than those with fewer registrants so classified.

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¶19. Sec. 6 –– Exemptions from Registration and Service –– Deferments

Section 6 establishes, with varying degrees of certainty and subject to varying degrees of administrative and executive incursion, classes of persons who may not be required to serve, who need not register, and who are temporarily deferred from service. The brief summary in this paragraph should be read in conjunction with the detailed discussion of classifications beginning at ¶1033 *infra.*

The following classes of persons are exempted from registration by §6: enumerated military personnel;[1] certain foreign diplomatic and consular officials and other classes of aliens designated by the President in implementing regulations;[2] commissioned officers of the Public Health Service, and reserve officers of the PHS assigned to staff the offices and bureaus of the Service or assigned to the Coast Guard, Bureau of Prisons or Environmental Science Services Administration,[3] and certain reservists on active duty.[4] See ¶1007 *infra* for details of these exemptions.

The following classes are statutorily stated to be exempt from military service but not from registration: those who served for 18 months in the armed forces of a country with which the United States is engaged in mutual defense activities (subject to that country's grant of reciprocal rights to American citizens);[5] veterans who have served prescribed periods of active duty;[6] satisfactorily serving members of National Guard and Ready Reserve units who, except in certain specified cases, enlist or accept their appointments in the National Guard or Ready Reserve prior to issuance of an order to report for induction;[7] registrants who have served six years in a reserve or National Guard unit;[8] ministers of religion and divinity students;[9] and sole surviving sons.[10] Conscientious objectors are a special class and are neither "deferred" nor "exempt."[11]

§6 also provides for "deferments." The important distinction between a deferment and an exemption is that one who is deferred under any provision of §6 incurs, under §6(h), extended liability for training and service to age 35.[12] See LBM 38. Those deferred by statute are: registrants enrolled in certain officer training programs;[13] certain premedical and other preprofessional students in medicine-related disciplines;[14] aviation cadet applicants;[15] certain elected public officials and judges of courts of record of the United States, its states, territories and possessions;[16] full-time undergraduate students who request deferment provided they are satisfactorily pursuing a course of study and until they reach 24, or obtain a baccalaureate degree;[17] persons in or preparing for occupations found to be within the national health, safety and inter-

1. §6(a)(1). See ¶1007 *infra.*

2. §6(a)(1). But the President may not exempt any alien admitted for permanent residence. §6(a)(1). See §1007 *infra.*

3. §6(a)(2). Prior to 1967, the Act exempted all PHS officers. Those PHS officers assigned to non-exempt activities prior to July 1, 1967, will continue to enjoy the exemption. *Id.* See ¶1007 *infra.*

4. §6(a)(1).

5. §6(a)(1). See R1622.40(a)(4). The countries are listed in LBM 76. See ¶1062 *infra.*

6. §6(b). The exemption terminates if Congress declares war or a national emergency. ¶1062 *infra.*

7. §6(c). Enlistment after issuance of an order to report exempts a registrant only if the Governor of the State (in the case of a National Guard unit) or the President (in the case of Ready Reserve units) declares that the strength of these reserve forces cannot be maintained solely by use of those who have not been ordered to report for induction. In any case, however, the registrant must enlist in the National Guard or Ready Reserve prior to the date scheduled for his induction. §6(c)(2)(A). R1622.1(f). See ¶1049.1 *infra.*

Note, however, that failure of a reservist or National Guardsman to serve satisfactorily during his obligated period of service subjects him to induction into the armed forces notwithstanding his classification or the order in which he would otherwise be called. §6(c)(2)(D); R1631.8. The induction provision for such persons is optional in the statute and mandatory in the regulation, rendering the regulation to that extent invalid. The local board in carrying out the provisions of the section is limited by other mandatory sections of the Act and may not refuse to hear claims of nonliability for service based on, for example, claims of conscientious objection. Quaid v. United States, 386 F.2d 25(CA10 1967) (*held:* R1631.8 invalid when construed to require induction of delinquent reservist despite his CO claim).

8. Except after a Congressional declaration of war or national emergency after August 9, 1955. §6(c)(2)(A). R1622.40(a)(7). See ¶1062 *infra.*

9. §6(g). See ¶1065 *et seq., infra. See* Oestereich v. Selective Service Local Board No. 11, 1 SSLR 3027 (1968).

10. Except in time of war or national emergency declared by the Congress after July 7, 1964, the date of enactment of the 1964 amendments to the Act. §6(o). The "sole surviving son" exemption is not styled as such, but as a prohibition on induction. However, one who does not claim under §6(o) prior to induction may be said to have waived his claim. Pickens v. Cox, 282 F.2d 784 (CA10 1960) (inductee who failed to raise claim until in army and charged by general court martial held to have waived claim). See ¶1062 *infra.*

11. §6(j). See ¶1034 *et seq., infra.* §6(j) goes beyond deferment or exemption mandatorily to forbid induction for combatant training and service of those conscientiously opposed to such service, and to provide for alternative civilian service by those conscientiously opposed to both combatant and noncombatant duty. See note 7 *supra.*

12. See LBM 38, discussed in text. LBM 38 should be consulted especially by those deferred under prior provisions of the Act and regulations. For example, III-A deferments granted under certain former provisions of the Act will not extend a registrant's liability. LBM 38 ¶3(g). See R1622.50(b), stating that those deferred under former provisions of §6(c)(2)(A), relating to the National Guard, incurred extended liability only to age 28.

13. §6(d). See ¶1049.1 *infra.*

14. §6(h)(2). See ¶1054 *infra.*

15. §6(e). See ¶1049.1 *infra.*

16. §6(f). See ¶1063 *infra.* An official other than one enumerated in §6(f) may be deferred under the provisions of §6(h)(2) if his activity in his office is found necessary to the national health, safety or interest. See ¶1054 *infra.*

17. §6(h)(1). This is the statutory undergraduate student deferment provided for in the 1967 amendments. One who requests and receives such a deferment is thereafter ineligible for deferment under any provision of §6(h) except those providing for deferment based on extreme hardship to dependents, graduate study and necessary employment. Nor is he eligible, after receiving his baccalaureate, for deferment under §6(i), providing for I-S deferments. Moreover, one receiving a II-S deferment after request is to be placed in the prime age group for induction (if there is ever a call by age groups, ¶1122 *infra*) irrespective of his actual age. See ¶1057 *infra.*

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est;[18] persons with dependents who meet standards prescribed by the President;[19] high school students (until graduation or until reaching age 20, whichever first occurs); and college students deferred to permit completion of the academic year in which an order to report for induction is issued.[20] Certain registrants found not qualified for service, LBM 38, are "deferred" by §4(a). See ¶8 *supra.* Deferments which extend liability are listed in LBM 38. Having had a deferment which extends liability will not necessarily subject a registrant to extended liability. This seeming paradox is explained in LBM 38, which provided in paragraph 2(c) that if a registrant was always, from June 19, 1951, until his 26th birthday, entitled to be placed in an exempt class (*i.e.*, one which does not extend liability), he will not incure extended liability merely because the board placed him in a deferred class (*i.e.*, one which does extend liability) on the basis of the deferred class being lower than the exempt class. See R1623.2

18. §6(h)(2). See ¶¶1053-56 *infra* on use of this provision by those in graduate study, critical occupations, apprentice programs, agricultural occupations, and junior colleges. §6(n) provides that within five days after the board grants an occupational deferment, the decision to grant the deferment may be submitted (apparently by the State or National Director) to the appeal board having jurisdiction over the area in which the registrant has his principal place of employment. This provision is apparently not implemented in the regulations. R1626.11(b) permits transfer of appeals in occupational deferment cases if the request for transfer is filed along with the notice of appeal. Any person appealing may obtain transfer – the registrant, his employer, the State Director or the Director.

19. The President is authorized, but not required, to provide for fatherhood and extreme hardship deferments. §6(h)(2). See ¶¶1060-61 *infra.*

20. §6(i). However, no person may be granted a deferment under this subsection if he has requested and received an undergraduate student deferment under the 1967 law and has received his baccalaureate degree. §6(h)(1). See ¶1057 *infra,* and note 17 *supra.*

¶20. Sec. 7 (Repealed)

Section 7, which related to active duty for certain reservists, was repealed by the Act of June 19, 1951, c. 144, §1(r), 65 Stat. 86, having been passed as part of the Act of June 24, 1948, 62 Stat. 614.

¶21. Sec. 8 –– Bounties and Substitute Service

Section 8 forbids the payment of bounties to induce persons to be inducted, forbids the provision of substitutes by those liable for induction, forbids the enlistment or induction of one person as a substitute for another and provides that no person may escape service or be discharged early by payment of money or other things of value.[1] The provision dates to the World War I draft laws.[2]

1. This section does not specifically proscribe bribery, and hence has been held not to preempt the field and preclude prosecution under the Criminal Code bribery provisions, now 18 U.S.C. §201, of a registrant who offerred an examining physician $500 to certify him as unfit for military service. Kemler v. United States, 113 F.2d 235 (CA1 1943).

2. Act of May 18, 1917, §3, 40 Stat. 76. See ¶2 n.6 *supra* and accompanying text.

¶22. Sec. 9 –– Rights of Inductees and Enlistees –– Certificate of Separation, Physical Examination, Reemployment, Voting.

Section 9(a) gives an inductee the right to a certificate, upon discharge after satisfactory completion of service, setting out the record of his service including any proficiency obtained.[1] Each inductee must also be given a physical examination upon his entry into training and service and upon the completion of his training and service. Upon his written request, he is entitled to a written statement of physical condition at the time of the latter physical.

Subsections (b) through (h) provide reemployment rights for inductees, enlistees, and reservists called to active duty for training or service or for "inactive duty training" who prior to their entry upon active

1. Section 9(j) requires the Secretaries of the Army, Navy, Air Force, and Treasury, as appropriate, to furnish certificates of separation to the Selective Service System for each person separated from active duty. Presumably, however, this provision does not relieve the registrant from the duty to report his separation to his local board as a fact which will affect his classification.

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service were employed by the federal government or a private employer.[2] It is also declared to be the "sense of the Congress" that states and their political subdivisions should grant the same rights. The section provides that leaves of absence, without prejudice to seniority, status, pay and vacation rights must be granted reservists who are undergoing training periods and registrants who are undergoing physical examination or preinduction processing. The federal district courts are given jurisdiction to hear claims arising from denial of these rights by a private employer, and to give specific relief (*e.g.*, to order the employer to reemploy the employee) and damages. The appropriate United States Attorney is required to represent such persons if he finds that the person is entitled to the benefits of §9. Court costs or fees may not be taxed against a litigant who seeks benefits under §9.

Section 9(i) provides for the right of inductees to vote by absentee ballot during their period of training and service, and forbids exaction of a poll tax as a condition to their voting in any federal election.[3]

2. *See generally* Accardi v. Pennsylvania R.R. Co., 383 U.S. 225 (1966), which holds that the intent of the section is to guard against pecuniary loss for those who enter the armed forces, and therefore that an employer could not, in computing "compensated time" for purposes of seniority and benefits, fail to include time spent in the armed forces. To the same effect is Oakley v. Louisville & Nashville Ry. Co., 338 U.S. 278 (1949), relied on in *Accardi.* Therefore, in computing paid vacations based on length of service with the employer, the returning veteran is entitled to have his military service considered as service to his employer. Saleck v. Gt. Northern Ry. Co., 277 F.Supp. 936 (D.Minn. 1967); Edwards v. Clinchfield R.R. Co., 278 F. Supp. 751 (E.D. Tenn. 1967). The provision overrides contrary provisions of collective bargaining agreements or other contractual relationships. *E.g.*, Moe v. Eastern Air Lines, Inc., 246 F.2d 215, 221 (CA5), *cert. denied,* 357 U.S. 936 (1957). *See* McKinney v. Missouri-Kansas-Texas Ry. Co., 357 U.S. 265 (1958) (applicant for reemployment need not exhaust reinstatement remedies in collective bargaining contract or before National Railway Adjustment Board).

But a former employee may be barred by failing to present his claim in a timely manner, *see* Act §9(b)(2); Fessler v. Reading Co., 138 F. Supp. 203 (E.D. Pa. 1955), and an employee whom the employer is otherwise entitled to discharge – such as a "disruptive" employee – need not, perhaps, be reemployed. Reynolds v. S & S Corrugated Paper Machinery Co., 230 F. Supp. 855 (E.D.N.Y. 1964) (alternative holding).

3. The poll tax provision is rendered superfluous by the twenty-fourth amendment and the Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.* See also Carrington v. Rash, 380 U.S. 89 (1965) (state denies equal protection when it applies different voting residency requirements to servicemen stationed within its borders than to civilians); Hayser v. Virginia Board of Elections, 383 U.S. 663 (1966) (poll tax).

¶23. Sec. 10 –– Establishment of the System –– Rule-Making Authority

Section 10(a) makes clear that all before has been merely prelude. It begins "There is hereby established in the executive branch of the Government . . . the Selective Service System. . . ." Section 10, as a whole, defines the structure of the System, and provides for its operation. The discussion in this paragraph is confined to the bare outline of §10. The structure and operation of the System are discussed in more detail in ¶¶31-35 (rule-making authority and System regulations), and ¶¶36-48 (personnel of Selective Service from the Director to the local board members, including auxiliary personnel).

Sections 10(a)(2) and 10(b)(3) establish the basic units of the System: National Headquarters, State Directors, appeal boards, local boards and officers and employees of these. The qualifications of officers and employees, and the jurisdictions of the agencies within the System, are set out at ¶¶36-48 *infra.*[1]

Section 10(b) gives the President the power to create and staff the System. Section 10(b)(1) gives him rule-making power and §10(c) an ostensibly unlimited power to delegate any function given to him under the Act, and to provide for subdelegation of that authority.

Section 10(g) provides for a semiannual report from the Director to Congress, and prior to 1967 provided for an annual report.

1. Section 10(b)(3), as the result of a 1967 amendment, also forbids judicial review of the "classification or processing" of any registrant except as a defense to a criminal prosecution under §12 of the Act after the registrant has responded either affirmatively or negatively to an order to report for induction. This limitation upon judicial review does not suspend the writ of habeas corpus. Its meaning, scope and constitutionality are discussed in Parts III and IV of this manual. *See* Griffiths, *Some Notes, etc.*, 1 SSLR 4012 (1968); Oestereich v. Selective Service Local Board No. 11, 1 SSLR 3027 (1968); Leonard & Frantz, *Judicial Review of Selective Service Orders*, 26 Guild Practitioner 85 (1967).

¶24. Sec. 11 –– Injury or Death of Registrants While Acting Under Orders

Section 11 provides that registrants who suffer injury or death while acting under order issued under the Act may be given hospital care or burial expenses. Burial expenses may not exceed $150. See R1609.51, implementing §11.

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¶25. Sec. 12(a) –– Criminal Penalties For Interference with the Administration of the Act or Failure to Perform Required Duties –– False Statements –– Conspiracy –– Trial

Section 12 is the criminal penalty section of the Act. The discussion in this and the following paragraph is only an outline, and full discussion of the points here raised is deferred to Part III of this Manual. Section 12 defines offenses either directly or by reference to the rules and regulations issued pursuant to the Act or the "directions given thereunder". Violation of any provision of §12 subjects the offender to not more than five years imprisonment, a fine of not more than $10,000 or to both such fine and imprisonment. The offense provisions are in two subsections, (a) and (b).

The first category of offenses under §12(a) proscribes the "knowing" failure or neglect by "any member of the Selective Service System" or "any other person charged as herein provided with the duty of carrying out the provisions of this title or the rules and regulations made or the directions given there under" to perform that duty. The "members" of the Selective Service System are most probably those listed in §10 as comprising the system. It is doubtful that registrants and persons required to register would be considered in this class. The duties are statutory duties, such as the duty to report when ordered to alternative service, or to register,[1] or duties imposed by regulation or direction, such as the duty to report for preinduction physical[2] or for induction.[3] By this means, the entire structure of rules and regulations becomes laden with springes for one who is inattentive to his obligations.[4] Elsewhere in §12(a), however, it is made an offense for "any person" knowingly to "fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title." Prosecution under this clause would not require proof, as an element of the offense,[5] that the defendant is a person charged generally with carrying out duties under the Act, but only that he was required to carry out the duty he is accused of omitting to perform.

Two clauses of §12(a) prohibit the making of false statements. Members of the System and those charged with carrying duties under the act are forbidden knowingly to make, or be a party to making, "any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster."[6] The next clause makes it a crime for "any person" knowingly to make or be a party to making a false statement "bearing upon a classification, or in support of any request for a particular classification," thereby incorporating a kind of materiality requirement into the proscription.[7]

It is also a crime for "any person" to "otherwise" (than in the foregoing clauses) evade or refuse registration or service, or any requirement of the Act, or regulations and directions made under it, and for any person knowingly to counsel, aid or abet such refusal or evasion.[8] "Counsel" in this context should not be taken to mean legal advice, as the judicial definition of it has been narrower, reading "counsels" in the same breath with "aids" and "abets", terms which have traditional meanings in substantive criminal law.[9]

1. §6(j) (alternative service); §3 (registration).
2. R1628.16.
3. R1632.14 (continuing duty).
4. Inattention alone will probably not suffice to convict, however, for the Act and the judicial decisions under it require criminal intent. *E.g.,* Silverman v. United States, 220 F.2d 36 (CA8 1955). *See* Bartchy v. United States, 319 U.S. 484 (1943). The intent requirement is discussed in detail in Part III of this Manual.
5. The elements of an offense include, at the very least, that which "is included in the description of the forbidden conduct in the definition of the offense." A.L.I., Model Penal Code §1.13(9) (Proposed Official Draft 1962).
6. The language is broad enough to reach a local board member or official who, with the proscribed intent, withholds a classification to which a registrant is entitled. There are no reported instances of prosecutions on this theory, however. *Cf.* Cohen v. United States, 144 F.2d 984 (CA9 1944), *cert. denied,* 323 U.S. 797 (1945).
7. Materiality has been read into the definition of the offense, *See* United States v. Rubinstein, 166 F.2d 249, 255 n.7 (CA2), *cert. denied,* 333 U.S. 868 (1948), and the statute requires that the falsity relate to the classification process. The Second Circuit has gone beyond the statutory definition to hold that a false statement upon which the registrant, at the time he makes it, indicates he will not rely, cannot be the basis for criminal liability. United States v. Rubinstein, 166 F.2d at 257. A registrant who is good faith sought, and one who in good faith agreed to help him seek, deferment were held not liable to conviction under the predecessor to the present §12(a). United States v. Schachtrup, 140 F.2d 415 (CA7 1944).
8. The leading cases are *Gara v. United States,* 178 F.2d 38 (CA6 1949), *aff'd by an equally divided Court,* 340 U.S. 857 (1950); Keegan v. United States, 325 U.S. 478 (1945); Okamoto v. United States, 152 F.2d 905 (CA10 1945). The counselling aiding and abetting referred to is not an accessorial crime but a separate offense, and therefore it is not necessary that the person or persons counselled actually refuse or evade registration or service. *Gara, supra;* Warren v. United States, 177 F.2d 596 (CA10 1949), *cert. denied,* 338 U.S. 947 (1950). The *Gara* intimation that the "tendency" of the counselling to cause refusal or evasion was all that was needed for conviction (178 F.2d at 40) is in doubt, given the holding in Bond v. Floyd, 385 U.S. 116, 133-34 (1966), that the activities of the petitioner, a state legislator denied his seat in part for antidraft and antiwar statements, could not be prosecuted under the Selective Service law consistently with the first amendment guarantee of free speech. The Court cited, in support of its holding in *Bond*, decisions setting high standards for prosecution of speech: Wood v. Georgia, 370 U.S. 375 (1962) (clear and present danger); Yates v. United States, 354 U.S. 298 (1957) (more than mere "urging" must be proven); and Terminiello v. Chicago, 337 U.S. 1,4 (1949) ("clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest"). The statements claimed to be in violation of §12(a) included a Student Nonviolent Co-ordinating Committee statement, "We are in sympathy with, and support, the men in this country who are unwilling to respond to a military draft." 385 U.S. at 133. The statute proscribes only "knowing" counselling, aiding and abetting, which means the design to do the specific act denounced by §12(a), and papers showing participation by a defendant in antiwar activities have been held not subject to seizure as bearing on the defendant's state of mind, the court remarking that a general ideological opposition to war and the draft is not enough to convict. United States v. Coffman, 50 F. Supp. 823, 826 (S.D. Calif. 1943) (Yankwich, J.). *Compare* Baxley v. United States, 134 F.2d 937 (CA4 1943), in which evidence of ideological opposition to World War II was held properly admitted under cautionary instructions. See also cases cited *supra.*
9. See Part III for a fuller discussion. 18 U.S.C. §2 is the counselling, aiding and abetting prohibition generally applicable in federal criminal law.

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It is a crime for "any person or persons" knowingly to "hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration" of the Act or the regulations and directions made under it.[10]

Under the 1940 Act, the penalties section required that the interference be by force or violence, and nonviolent acts of interference were not punishable.[11] In the 1944 case of Bagley v. United States, the fifth circuit held that the purpose of limiting the proscription to forcible or violent hindrance was to prevent the Act from being used as an instrument of "partisan oppression."[12]

Conspiracy to violate any provision of § 12(a) is a separate offense.[13] The § 12(a) conspiracy provisions do not, unlike the general federal conspiracy law,[14] require an overt act and an indictment which contains no allegation of an overt act in furtherance of the conspiracy is not subject to a motion to dismiss.[15] The conspiracy provisions thus, on their face, punish mere agreement as did the common law crime of conspiracy.[16]

Trial for a violation of § 12(a) is to be by appropriate[17] United States district court, unless the defendant has been "actually inducted" or is subject to military law under laws in force prior to the enactment of the Act.

The symbolic step forward at the induction center is now the principal means by which one becomes "actually inducted" in contradistinction to the World War I practice of letting a registrant know by mail that he was in the military as of a certain day,[18] or the World War II occasions when confusion could result in one becoming a soldier by indirection.[19] However, it is by no means the only way to become inducted. Induction by estopell, *i.e.*, by submitting to military authority without formally taking the oath, has been recognized by the courts.[20]

10. The interference must be with the intent to affect the operations of the system. For example, an assault upon a local board member over a disagreement unrelated to the draft is punishable only as an assault under state law, while an assault with the intention to intimidate him in the exercise of his duties is punishable under § 12(a). Chambers v. United States, 1 SSLR 3023 (CA5 1968) (dictum).

11. § 11, Selective Training and Service Act of 1940, 54 Stat. 894 re-enacted, 60 Stat. 341, expired, Mar. 31, 1947.

12. 136 F.2d 567 (CA5 1943). The strong language of the *Bagley* opinion casts doubt upon the constitutionality of the present version, particularly as applied to speech.

13. The conspiracy provision embraces conspiracies to commit any substantive offense enumerated in § 12(a). Singer v. United States, 323 U.S. 338 (1945); United States v. Keegan, 141 F.2d 248 (CA2 1944), *rev'd on other grounds,* 325 U.S. 478 (1945).

14. 18 U.S.C. § 371. *See generally* Note, Developments in the Law –Criminal Conspiracy, 72 Harv. L. Rev. 920 (1959).

15. Singer v. United States, 323 U.S. 338 (1945), *affirming* (CA3 1943), affirming 49 F. Supp. 912 (W.D. Pa. 1943). United States v. Singer, 141 F.2d 262 (CA3 1943).

16. *See* Note, Developments in the Law – Criminal Conspiracy, 72 Harv. L. Rev. 920, 945-49 (1959).

17. Venue in selective service prosecutions is laid where the duty required of the registrant is required to be done, Johnston v. United States, 351 U.S. 215 (1956), which often results in a trial distant from the defendant's home and in a place where he may never have been. 351 U.S. at 223 (dissent). Correction of venue choices based upon technical and not substantial justice is available to a defendant under Federal Rule of Criminal Procedure 21(b), as amended in 1966. See Advisory Committee Notes to Proposed Criminal Rules 39 F.R.D. 168, 185 (1966), and authorities there cited.

18. *See* Annot., 129 A.L.R. 1171, 1198 (1940).

19. *See generally* Estep v. United States 327 U.S. 114 (1946).

20. *Compare* Sanford v. Callan, 148 F.2d 376 (CA5), petition for cert. dismissed, 326 U.S. 679 (1945) (induction by estoppel), *with* Cox v. Wedemeyer, 192 F.2d 920 (CA9 1951) (no induction though registrant wore army uniform, drew army pay); Corrigan v. Sec'y of the Army, 211 F.2d 293 (CA9 1954); United States v. Hall, 36 U.S.L.W. 2018 (U.S. Ct. Mil. App. June 16, 1967). See ¶1127 *infra.*

¶26. Sec. 12(b) –– Offenses Relating to Certificates

Section 12(b) defines a number of offenses relating to registration certificates, alien's certificates of nonresidence and other certificates issued under or prescribed by the Act,[1] and forbids the transfer of any such certificate for the purpose of making a false identification or representation,[2] the possession of a certificate not issued to the possessor but carried for the purpose of making a false identification or representation,[3] forgery, alteration, knowing mutilation or knowing destruction of a certificate or a notation inscribed on it,[4] making a likeness of a certificate with the intent that the likeness be used for false identification or representation,[5] knowing possession of a forged or altered certificate,[6] or violation of any provision of the Act or regulations relating to issuance, transfer or possession of a certificate.[7] The section also establishes a presumption that one who possesses a certificate not duly issued to him has the intent to use it for false identification or representation.[8] A detailed description of these offenses, and of trial practices in prosecution under § 12(b) appears in Part III of this Manual.

1. By this means, the President is given power to create, by regulation, any number of certificates relating to the draft and require registrants to carry them. Principal among the certificates thus created is the notice of classification, SSS Form 110, *see* R1623.5.

2. § 12(b)(1).

3. § 12(b)(2).

4. § 12(b)(3), as amended in 1965 to proscribe destruction or mutilation – the so-called "draft card burning statute."

5. § 12(b)(4).

6. § 12(b)(5).

7. § 12(b)(6), which gives effect under the criminal laws to R1517.1, 1623.6, requiring possession of registration certificate and notice of classification respectively.

8. § 12(b). *See* Morrissette v. United States, 342 U.S. 246, 274-76 (1952), which casts doubt upon the constitutionality of a presumption of criminal intent in a felony case.

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¶27. Sec. 13 — Exemption of the System from Certain Laws

Section 13(a) exempts uncompensated Selective Service officials, hearing officers on CO claims, (under the pre-1967 provisions of law) and members of the National Appeal Board from the Criminal Code conflict of interest laws[1] and from the prohibition on partisan political activity applicable to other civil servants.[2] Part 1600 of the regulations deals with conflict of interest in detail.

§13(b) exempts all functions performed under the Act from all provisions of the Administrative Procedure Act except §3, relating to freedom of information and publication in the Federal Register of directives which affect the rights of persons under the agency's jurisdiction.[3]

1. 18 U.S.C. §§203, 205, 207.
2. Cited in the Act as 5 U.S.C. §1181, recodified in 1966 to 5 U.S.C. §§7324, 7325, 7327, 80 Stat. 525-26.
3. 5 U.S.C. §552. §13(b) was upheld and applied in United States v. Wierschcuki, 248 F. Supp. 788 (D. Wisc. 1965), and Feldman v. Local Board No. 22, 239 F. Supp. 102 (S.D.N.Y. 1964).

¶28. Sec. 15 — Notice, Severability, Enlistments[1]

Every person is "deemed" to have notice of the requirements of the Act; §15(a).[2]

Section 15(b) creates the statutory duty of every registrant to keep his local board informed of his current address and changes in status "as required by . . . [the] rules and regulations;"[3]

Section 15(c) contains a severability clause, providing that the invalidity of any portion of the Act, or its invalidity as applied to a particular circumstance, shall not affect the remainder of the Act or its applicability to other persons and circumstances.[4]

Section 15(d) makes clear that the Act does not suspend or supercede the laws relating to enlistment, except that one may not be accepted for enlistment after receiving an order to report for induction. The President may, however, suspend voluntary enlistment or re-enlistment upon finding that the national interest is imperiled.

1. §14, not covered in the Manual, deals with the application of the soldiers' and sailors' civil relief legislation.
2. The "notice" requirement is triggered by a presidential proclamation calling for registration. The first such proclamation under the direct forbear of the 1967 Act was Proclamation 2799, July 20, 1948. See ¶1007 *infra* discussing registration in detail.
3. *See* Bartchy v. United States, 319 U.S. 484 (1943), and Part III of this Manual. See also ¶25 *supra.*
4. This provision has been held to preclude a constitutional challenge to conscription on the part of one who was indicted for failure to register, on the ground that even if the induction provision of the Act were invalid, the registration provisions would not fall with them. United States v. Richter, 83 F. Supp 986 (S.D. Calif. 1949).

¶29. Sec. 16 — Definitions

Section 16 defines the terms, "between the ages of 18 and 26", "United States", "armed forces", "district court of the United States", "local board", "Director", "duly ordained minister of religion", "regular minister of religion", "organized unit", and "reserve component of the armed forces". These terms are discussed at appropriate places in the Manual.

¶30. Secs. 17 through 21.

The remaining provisions of the law are either housekeeping details or beyond the scope of this manual. Section 17(c) provides for the repeal of all conflicting laws, and for the termination of authority to induct on July 1, 1971, except that persons deferred under §6 may be inducted when the basis for their deferment ceases to exist.

E. Regulatory Materials Issued By the System and Its Components

¶31. Regulatory Material Generally — Freedom of Information.

The regulatory material issued by the System and its components is copious. Muchof it is issued "informally," is not published in the Federal Register or by the Government Printing Office and is therefore not easily obtained by the seeker after information. It may be categorized as follows: regulations, local board memorandums, informal National Office advisory and directory memoranda, and State Director materials. These materials are discussed in the following sections.

The Selective Service System is subject to §3 of the Administrative Procedure Act (APA), which

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governs publication of regulatory materials and dissemination of agency information. In addition, R1606.62-.63 provide for reference to the Director of certain requests for information, and thus seek to place limitations upon the manner and extent of disclosure. Other disclosure provisions appear at R1606.55 and following.

Section 3 of the APA, as amended in 1967 to its freedom of information provisions,[1] requires publication in the Federal Register of: the organizational structure of the System, including offices where decisions and information may be obtained, and submittals made; the procedures used to make agency decisions; and rules of general applicability adopted as authorized by law, and policies or interpretations of general applicability adopted by the System.[2] No registrant may be adversely affected by, nor may he be required to resort to, any provision required by §3(a)(1) to be published in the Federal Register and not published, unless he has actual and timely notice of the provision.[3] This provision is reinforced by a similar requirement in the Federal Register Act, 44 U.S.C. 301-11.

A second class of materials consisting of general policy guidelines, and defined in §3(a)(2) of the APA are not required to be published in the Federal Register, but must be made available for public inspection and copying and must also be indexed if issued, adopted or promulgated after July 4, 1967. Materials meeting the criteria in APA §3(a)(2) and not published in accordance with its provisions may not be cited, used, or relied upon by the agency unless the party sought to be affected has actual and timely notice of them.[4]

Finally, other identifiable agency records must be made available to members of the public who ask for them in the manner provided by regulations adopted by the agency.[5]

There are matters not required to be published or distributed in accordance with §3 of the APA. They include matters subject to executive privilege;[6] those related "solely" to internal personnel practices;[7] matter exempted from disclosure by statute;[8] trade secrets;[9] inter-agency or intra-agency memoranda which would not be available except to a party in litigation with the agency;[10] personnel and medical files disclosure of which would constitute a "clearly unwarranted" invasion of privacy;[11] law enforcement investigatory files;[12] and certain other financial and geophysical reports.[13] Finally, §3(c) provides that §3 is not authority for witholding information from or limiting the availability of records to, the public except as §3 specifically authorizes.[14]

§3(b) provides a judicial remedy for agency refusal to provide information. The venue for such an action is the judicial district where the complainant resides or has his principal place of business, or where the agency records are located. The complainant may bring his action, irrespective of jurisdictional amount, by filing and serving a civil complaint alleging the circumstances under which information was withheld and that the withholding was improper. The court may order records produced and enjoin the agency from

1. P. L. No. 9-23, 81 Stat. 54.

2. APA §3(a)(1), 5 U.S.C. §552(a)(1). The APA is hereinafter cited only to its section number, without a parallel citation to U.S.C. The Selective Service System takes the position that the regulations are the only matters required to be so published. However, while SSS forms are part of the regulations, R1606.51, they are not published in the Federal Register. The System policy in this regard is set forth, in *e.g.*, Letter from Daniel O. Omer, General Counsel, Selective Service System, to Editor-in-Chief, Selective Service Law Reporter, Mar. 21, 1968 (available in facsimile from SSLR).

3. APA §3(a)(1).

4. APA §3(a)(2).

5. APA §3(a)(3). In discussing a given statement of the National Headquarters or the Director, the mandatory or precatory character of the statement or product is the decisive factor in the determination whether publication in the Federal Register is required or whether merely making the statement available for inspection and copying will suffice. More important to the substantive rights of registrants, courts have held that precatory admonitions and interpretive statements by the Director may not be relied on by registrants as stating Selective Service policy, and may not be challenged *on their face* as rules or regulations which may adversely affect registrants in ways forbidden by statutes or the Constitution. See Goodwin v. Rowe, 49 F. Supp 703 (D.W. Va. 1943); United States *ex rel.* Lawrence v. Commanding Officer, 58 F. Supp. 933, 947 (D.Neb. 1945); Nat'l Student Ass'n v. Hershey, 1 SSLR 3026 (D.D.C. 1968); *Ex parte* Stewart, 47 F. Supp. 415, 418 (S.D. Calif. 1942). *But see* Memorandum for the Respondents, Oesteriech v. Selective Service Board No. 11, 1 SSLR 3027 (USSC 1968) (board action in reliance on SSS directive conceded to have been unlawful). Both of these results seem questionable, for the first case, if the policy directive is actually followed in a majority of, or almost all, cases, then the registrant not given the benefit of it has been the victim of an actual invidious discrimination. *Cf. Ex parte* Asit Ranjan Ghosh, 58 F. Supp 851 (S.D. Calif. 1944), *appeal dismissed,* 148 F.2d 822 (CA9 1945). In the second case, that of a registrant or class of registrants seeking to challenge an allegedly unconstitutional or otherwise void precatory admonition, the authority and prestige of the Director within the Selective Service System should teach that his opinions are bound to have great practical weight irrespective of their force as "positive law." An advisory "operations bulletin" defining pregnancy of a spouse as a circumstance not beyond a registrant's control was held unlawful where used as a basis for classification. Talcott v. Reed, 217 F.2d 360 (CA9 1954). In the field of free speech, where great controversy has raged, even an advisory memorandum may have a forbidden "chilling effect" on the exercise of First Amendment rights. Dombrowski v. Pfister, 380 U.S. 479 (1965).

6. APA §3(b)(1). *See* Campbell v. Eastland, 307 F.2d 478, 486 (CA5 1962) (executive privilege "narrowly confined to matters affecting the national security").

7. APA §3(b)(2).

8. APA §3(b)(3).

9. APA §3(b)(4).

10. APA §3(b)(5).

11. APA §3(b)(6).

12. APA §3(b)(7). These files are available only to the extent otherwise provided by law. See 18 U.S.C. §3500 (Jencks Act).

13. APA §§3(b)(8), 3(b)(9).

14. The same denial of authority for witholding information appears in 5 U.S.C. §301, which authorizes heads of executive departments to make regulations concerning the operation of their departments. The language in §301 was added by a 1958 amendment to its predecessor, 5 U.S.C. §22 (1964 ed., repealed), because "every file clerk [had] become a censor." H.R. Rep. No. 1461, 85th Cong., 2d Sess, March 6, 1958, 1958 U.S. Code Cong. & Adm. News 3358, 3359. This congressional double emphasis upon the powerlessness of administrative officers to withold information upon a general plea of convenience unrelated to specific statutory standards casts doubt upon the validity of regulations such as those discussed in the text below.

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withholding records and may punish for contempt the responsible agency employee if the order is not complied with.[15]

The Selective Service System has sought to soften the impact of these provisions: R1606.63[16] requires requests for any information the disclosure of which is restricted or limited by Part 1606 of the Regulations to be referred to the Director for his decision on disclosure. A System employee or member is to decline production of records until the Director has ruled, and if he rules against production, is to decline production absolutely. This latter provision is premised upon *United States ex rel. Touhy v. Ragen,*[17] in which the Supreme Court held that the Department of Justice might provide for reference to the Attorney General of all requests for information as a valid "housekeeping" and centralization of authority provision. If the party aggrieved by the refusal to produce wanted satisfaction, he might, the Court indicated, sue the Attorney General.[18] However, §3(b) of the APA clearly contemplates suit not against the agency head but against subordinate employees, and punishment of them for contempt if they refuse the court's order. Thus, the portion of R1606.63 reserving to the Director the final decision may be an invalid assumption of authority to the extent that it seeks to require suit against the Director to obtain information about the System.[19]

The application of the APA to the Selective Service System is discussed in greater detail below, in the context of specific regulatory materials and other documents which may be required to be published or made available.

15. APA §3(a)(3). Martin v. Neuschel, 1 SSLR 3002 (E.D.Pa. 1968).

16. Enacted Mar. 18, 1968, 33 Fed. Reg. 4677 (1968).

17. 340 U.S. 462 (1951).

18. The Court did not reach and decide the question whether the regulation there involved conferred any authority upon the Attorney General to withhold information as a substantive matter. This question is settled by the amendment to 5 U.S.C. §301 cited above in note 14, and by the language of APA §3(c).

19. In Martin v. Neuschel, 1 SSLR 3002 (E.D. Pa. 1968) the court refused to require suit against the Director or even the State Director. R1606.62, promulgated at the same time as R1606.63, also forbids disclosure of the addresses and other "personal data" concerning local board members, and R1606.63 includes such disclosures of information "bearing on the qualifications of an official to serve" without approval of the Director. Not only must the Director approve, however, but apparently the individual concerned must consent or the local board chairman must, after consultation with the person concerned, specifically determine in writing that disclosure would not "harm such person, and would not constitute a clearly unwarranted invasion of his personal privacy." It should be recalled that residence, age and length of service are qualifications for local board membership, see ¶42 *infra,* and therefore this information can be important to a registrant who wishes to test the validity of a classification action by, for example, alleging his local board to have been improperly constituted. In Martin v. Neuschel, *supra,* the court held a registrant entitled to the information, but this was before enactment of the regulation. Moreover, R1606.62 shifts the risk of nonpersuasion on the issue of disclosure to the registrant, requiring a specific finding that the information does not come within a category exempt from disclosure. APA §3 appears to establish a presumption in favor of release, and places the burden upon the agency (1), to justify in writing any decision not to disclose and (2) to convince the court if suit should be filed that disclosure is not required.

¶32. Regulations — Publication, Validity, Failure to Follow

The regulations, codified in 32 C.F.R., Part 1660 and following, and reprinted in SSLR, form the basis for the operation of the System, its organization, and the classification process leading to deferment, exemption, availability and induction. The regulations are of two types: those issued by the President, and those issued by the Director of Selective Service under the authority delegated by the President in R1604.1(a).[1] With an important exception, amendments to these regulations are published in the Federal Register as required by §3(a)(1) of the APA and by the Federal Register Act.[2] The exception is this: Forms used by the System are by R1606.51 made part of the regulations, but they are not published in the Federal Register. Therefore, no registrant may be required to resort to, nor may he be adversely affected by, a requirement on a form, unless he has actual and timely notice of it. The same rule would apply to any regulation not published in the Federal Register. ¶31 *supra.*

The question as to which regulations are made by the President and which by the Director is the subject of no very clear directive. The President's rulemaking power, under §10(b)(1) of the Act, is plenary. The Director's rulemaking power, under R1604.1(a) is limited to matters which may be termed "housekeeping details." Although there is no case directly in point arising under the selective service law, decisions from other fields indicate that regulations beyond this grant of authority would be invalid.[3]

The regulations are of course subordinate to the Act or any other statutory authority, and regulations inconsistent with statute are void.[4] A registrant's knowing failure to perform a duty imposed by regulation

1. One can determine whether a given regulation was issued by the President or the Director by examining the explanation of amendments at the beginning of each part of the regulations. The delegation of Presidential rulemaking power to the Director has been held valid. Savoretti v. Small, 244 F.2d 292 (CA5 1967).

2. As the Selective Service System is exempted by §13(b) of the Act from APA §4, 5 U.S.C. §553, dealing with rulemaking, regulations may be issued without notice and without opportunity for interested persons to present their views. It has been suggested that rulemaking without safeguards such as those provided in ARA §4 denies due process. Newman, *The Berkeley Crisis,* 54 Calif. L. Rev. 118, 121 (1966).

3. *See* Peters v. Hobby, 349 U.S. 331 (1955) (administrative agency overrode adjudicatory powers conferred by the President and its action was to that extent invalid.)

4. Quaid v. United States, 386 F.2d 25 (CA10 1967).

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is a crime, as presumably is a local board member's or employee's.[5] But a board violation of a regulation in classifying a registrant may or may not be held to have prejudiced the registrant so as to invalidate an order to report for induction or a classification decision.[6] Cases from analogous fields of administrative law hold that failure to follow procedural regulations designed for the protection of persons subject to an agency's jurisdiction may be a denial of due process of law, even though the procedure prescribed by the regulation is not required by the Constitution to be provided.[7]

5. Act §12(a).

6. *E.g.*, Wills v. United States, 384 F.2d 943, 946 (CA9 1967); Knox v. United States, 200 F.2d 398, 401 (CA9 1952).

7. Service v. Dulles, 354 U.S. 363 (1957); Vitarelli v. Seaton, 359 U.S. 535 (1959).

¶33. Local Board Memorandums

Local Board Memorandums (LBMs) are issued by the Director of Selective Service, are available from the Government Printing Office, and are printed in full in SSLR. They cover details in the administration of the system, including interpretation of regulations, details on the keeping of records, and exceptions to general procedures in prescribed cases. Clearly the tone of the LBMs is mandatory and not precatory. They are not, however, published in the Federal Register. Therefore, one might argue that except as a registrant has actual and timely notice of an LBM, he may not be required to resort to a procedure established by it nor may he be "adversely affected by" it.[1] The Selective Service System, however, takes the position that the LBMs are "statements of policy and interpretation" within the meaning of APA §3(a)(2), 5 USC §552(a)(2) and are therefore not required to be published in the Federal Register.[2]

If it be held that LBMs are "regulations" of the sort required to be published in the Federal Register, they might be subject to the further infirmity of not being within the Director's rulemaking authority. See ¶32 *supra.* And even if no LBM may be termed a "regulation," it is questionable whether some LBMs are within the R1604.1(b) grant of authority to the Director to issue "instructions" which are "necessary for carrying out the functions" of the System.[3]

1. See ¶31 *supra.* An example of LBMs which may affect registrants is LBM 85, which provides for reclassification and delinquency determinations for registrants who abandon or mutilate their registration certificates or notices of classification. *See generally,* Pinkus v. Reilly, 157 F. Supp. 548 (D.N.J. 1957). *Compare* Airport Comm'n v. CAB, 300 F.2d 185 (CA4 1962). *See also* 44 U.S.C. §305(a) (Federal Register Act): "every document or order which shall prescribe a penalty shall be deemed to have general applicability and legal effect."

2. See ¶31 *supra.*

3. LBM 85, for example, which provides for prompt reclassification and delinquency status for a registrant who dispossesses himself of his registration certificate or notice of classification, appears to reflect a fundamental classification policy decision which ought to be made by the President, if at all.

¶34. Other Material Issued by National Headquarters

Other materials issued by the National Headquarters and the Director include Operations Bulletins concerning particular aspects of local board and Selective Service operation and management.[1] R1606.57(d) states that "Current Operations Bulletins, which are temporary in character, may be inspected at the office of any local board, the office of the State Director . . . or at the office of Public Information, National Headquarters. . . ." Section 3 of the APA requires that policy statements be available for "inspection and copying,"[2] and should be the answer to any question concerning the availability of this material to the public.

Also issued by the System are "information bulletins," a numbered series; press releases, which answer commonly asked questions about Selective Service from the point of view of the System; letters and statements and reports by the Director,[3] books and pamphlets on Selective Service; and other material not easily characterized. The general policy of the System, as expressed in R1606.56, is to make all relevant information about the system available except: information which infringes privacy, is barred from disclosure by Executive Order or by the Director, or deals with the internal functioning of the System and whose disclosure would impair the functioning of the System.[4]

1. See ¶31 n.5 *supra.* Ops. Bull. O, as amended from time to time, lists all operations bulletins current as of its most recent amendment. (As of April 1968, the most recent amendment was Sept. 1, 1966). Query whether this periodic updating meets the indexing requirements of the APA. See ¶31 *supra.*

2. Selective Service (monthly SSS newsletter), February 1968, p. 2, states that operations bulletins are not available for distribution outside the Selective Service System, an apparent conflict with the APA §3 inspection and copying provisions.

3. Including annual reports through 1967, and semiannual reports thereafter, as required by §10(g) of the Act.

4. A full discussion of disclosure is in ¶31.

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¶35. Materials Issued by State Directors

Much regulatory material is issued by State Directors or under their direction. Variously styled memoranda, letters, bulletins, and advices, the State Directors issue their own interpretation of the regulations and LBMs.[1] See ¶40 *infra.* The National Advisory Commission on Selective Service found great variation among states in interpretations of regulations, particularly in the field of student deferments.[2] These directives should be available for inspection at the office of the local board, as they relate to classification policy and affect the status of registrants.[3] Other publications of the State Director's office include a Handbook for Government Appeals Agents in some states, which should similarly be available for inspection and copying.[4]

1. National Advisory Comm'n on Selective Service, In Pursuit of Equity: Who Serves When Not All Serve?, at 167-75 (1967). In *Ex parte* Asit Ranjan Ghosh, 58 F. Supp. 851, 857 (S.D. Calif. 1944) appeal dismissed, 148 F.2d 822 (CA9 1945), the court held: "the State Director is not empowered under the Act to promulgate rules or regulations nor to substitute his judgment for that of the local or appeal boards." See ¶40 *infra.*

2. National Advisory Comm'n, *supra* note 1.

3. See ¶31 *supra.*

4. See ¶31 *supra.*

¶35.1. Regulations Issued by Other Agencies

The conduct of Armed Forces Examining and Induction Stations is the responsibility of the military authorities. Regulations concerning physical and mental standards, AR 40-501, security and loyalty, AR 604-10, and "moral fitness," AR 601-210; AR 601-270, are discussed in Part II of this *Manual.* The relevant provisions of AR 40-501, AR 604-10, and AR 601-210 are reprinted in the *Statutes & Regulatory Material* section of SSLR. The physical and mental fitness regulations are also the governing standard in claims for exemption made before local boards. See ¶¶1008-13 *infra.*

F. Boards, Agencies, and Personnel of the System

¶36. The President

At the head of the Selective Service System is the President of the United States, who is authorized by §10(b) to make rules and regulations to carry out the Act's provisions, to appoint State Directors and the National Director and to create and establish civilian local boards and agencies of appeal, and to appoint their members from among citizens of the United States otherwise qualified to serve.[1] By §3 of the Act, the President is to fix a day or days for registration of eligible males. ¶1007 *infra.* The President fixes the number of men to be called for induction, §4(a), but by R1631.4 has committed this authority to the Secretary of Defense.

The President, by §10(c) may delegate any authority possessed by him under the Act, and in practice has done so to a great extent. The Director of Selective Service has acquired the larger share of power over the internal operation of the Selective Service System. R1604.1. However, the President issues the regulations dealing with substantive rights under the system, including classification criteria. See ¶32 *supra.* In addition, the President has delegated certain functions, such as the power to waive the physical and mental standards established by §4(a) to the Secretary of Defense.[2] The powers of the President under §10(b)(3) relating to his final authority in all matters of classification have been delegated to the National Selective Service Appeal Board. R1604.6(b). As a practical matter, therefore, the President seldom obtrudes upon the day-to-day operation of the System.

1. The qualifications of these officials are set forth in ¶¶36-48 *infra.*

2. Exec. Order No. 10776, 23 Fed. Reg. 5683 (July 28, 1958).

¶37. The Director of Selective Service

The Director of Selective Service has power: to make certain types of rules and regulations, R1604.1(a), §32 *supra;* to make orders providing for employees, office space and office supplies for the system, R1604.1 (c), (d), (e), (h); and to delegate his authority, R1604.1(g). He may summarily remove from office any person engaged in the administration of the System, except a compensated civilian officer or employee (who is under civil service), R1603.6,[1] and may summarily suspend *any* officer or employee, R1603.7.[2] He allocates calls for induction among the states, using lists of debits and credits furnished by the State Directors.

1. Compensated civilian employees are to be removed in accordance with civil service rules. R1603.6.

2. During the period of suspension, the suspended official or employee is disqualified to act in his official capacity. R1603.6.

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R1631.5. He also performs other functions delegated to him by the President. He is at the apex of the System, and even his advisory memoranda and informal opinions are of great weight in its operations. In the classification and appeal process, his authority may be asserted at any time in support of or in opposition to the claim of a registrant. He may direct that any registrant be "classified or reclassified without regard to his eligibility for a particular classification," R1622.60;[3] may appeal at any time from the decision of a local board or appeal board, R1626.1, 1627.1; and may direct an appeal board to reconsider its decision at any time, R1626.61; and may at any time order a registrant's classification reopened, R1625.3.[4] He may order a registrant transferred for induction. R1632.10.

The aid of the Director may, therefore, be of decisive weight in securing a favorable classification or a review of procedural irregularity. And since the National Headquarters is sensitive to the prospect of unfavorable judicial commentary upon classification practices, its aid may profitably be invoked on occasion. Typically, the General Counsel should be contacted as the proper official to bring such a matter, with the legal issues having been subjected to careful analysis, to the attention of the Director.

3. This extraordinary power is, according to Selective Service sources, designed to enable the Director to obtain deferment or exemption for, *e.g.*, United States intelligence agents.

4. If he does so order, the local board must cancel any outstanding order to report for induction or for civilian work and classify the registrant anew. R1625.3 Refusal of the board to take these steps entitles the registrant to refuse induction. Estep v. United States, 327 U.S. 114, 121 (1946) (dictum).

¶ 38. National Headquarters

The National Headquarters of the Selective Service System, 1724 F Street, N.W., Washington, D.C. 20435, houses the central recordkeeping and operating functions of the System. The current officers are listed in the Government Organization Manual which is issued annually by the Superintendent of Documents and costs $2.50. Since the operations of the System are largely decentralized, the National Headquarters exercises principally a coordinating role, except for matters under the jurisdiction of the Director. Within the National Office, the General Counsel, Office of Public Information, Office of Research and Statistics, Office of Legislation and Liaison, and the Chief Medical Officer are the personnel of whose existence the registrant and his counsel should be aware. The policy of the System, expressed in R1606.55 *et seq.*, is to answer inquiries about its operations and regulations from registrants, their counsel and other interested persons.

¶ 39. National Selective Service Appeal Board

The National Board, consisting of three civilians appointed by the President, R1604.6(a), has been designated by the President to exercise all powers of appeal and classification given to him in Act § 10(b)(3). R1604.6(b). The Board is required to be "in all respects independent of the Director," R1604.6(c), except that the Board and the Director are to exchange information and assistance to "further the objectives" of the Act, and the Director is to provide facilities for the Board's meetings and to provide for compensation of its members. R1604.6(d). The procedure on appeal to the Board is discussed at ¶¶1090-94 *infra.*

¶ 40. State Director — Office of State Director

State Directors of Selective Service are appointed by the President upon the recommendation of the governor of each state, or comparable official. ("Governor" is defined in R1602.5.) The State Director "represent[s] the governor" and is in "immediate charge" of the State Headquarters. There are State Directors for each State, for New York City,[1] the Canal Zone, Guam, Puerto Rico, the Virgin Islands, and the District of Columbia. The addresses of State Directors are published in R1606.58(f).

The State Director supervises the registration process in his state and may, with the approval of the National Director, modify the procedures set out in the regulations in order to "effect a complete registration."[2]

He is also authorized, by R1606.51, to issue special forms for use in his state, although the Director of Selective Service must approve each form before it is used. The presence of two specific rulemaking permissions in the regulations would appear to negate the State Director's power to issue other types of regulations and directives, but in practice many State Directors issue a number of quite important qualifications and interpretations of national office regulatory material. See ¶35 n.1 *supra.*

1. The governor of New York state recommends candidates for State Director for New York City. R1604.13.

2. But see ¶31 *supra,* indicating that no modification not published in the Federal Register may impose a mandatory duty upon one not having actual notice of it.

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The State Director may order a registrant transferred for classification under certain circumstances, R1623.9;[3] may order in writing that a registrant's classification be reopened, R1625.3(a);[4] may take an appeal at any time from the decision of a local board or appeal board, R1626.1, 1627.1;[5] and may direct in writing that an appeal board reconsider its decision, R1626.61. For more details of these matters, see ¶1095 (reopening), 1087 (appeal to appeal board), 1091 (appeal to National Board), and 1089 (reconsideration by appeal board).

The State Director also plays a crucial role in the induction process. The National Director allocates each call for induction among the states, and each State Director must divide the call among local boards. R1631.6. He must report the proper induction and enlistment information to the National Director to enable the latter to compute the quotas, debits and credits for each state, and must allocate debits and credits among the local boards in the state. R1631.2(d).

The office of the State Director is staffed with personnel who oversee the classification process in the State. On request of a registrant or his counsel, a State Director staff person may look into a particular local board action; also, in some states periodic spot-checks are made of classification practices. Some state offices have "field supervisors" who perform this function. In practice, requests that the State Director intercede on a registrant's behalf, particularly in taking an appeal to the National Board when there is no division in the appeal board, are initially processed by subordinate employees, and the attorney who practices in a given state should learn their names, titles, functions, and attitudes.

3. For disqualification on the basis of relationship to the registrant, R1604.55, or to ensure equitable enforcement of the Selective Service law, R1623.9(c)(2), or to equalize the workload between panels of a local board, R1623.9, 1652(a).

4. Whereupon any outstanding order to report for induction or for civilian work must be cancelled by the local board. R1625.3. See ¶37 n.3.

5. Either the State Director in the classifying state or the State Director in the State to which an appeal is transferred for decision may appeal to the National Board. R1627.2.

¶41. Appeal Board — Qualifications, Area, Appointment

Generally, there is one appeal board for each Territory or possession, one for the District of Columbia, and one for each federal judicial district, which may be coterminous with the boundaries of a state or comprise part of a state.[1] Special provision is made for New York City and State. R1604.21. The five members of each appeal board are appointed by the President on recommendation of the appropriate Governor or comparable official. If the number of appeals becomes too great, additional appeal boards may be constituted within a given State or district, and the boards then sit in numbered "panels," which act separately. The workload among the panels is allocated by the State Director.

Members of appeal boards must be citizens, male or female, of the United States and may not be members of the armed forces. They may not serve for more than 25 years, nor after reaching the age of 75. Act §10(b)(3).[2] In addition, they must be at least 30 years of age and residents of the area governed by the board. R1604.22.[3] Appeal boards hear and decide appeals from local boards within their jurisdiction, and appeals transferred to them in accordance with the provisions of the regulations. The appeal board classifies the registrant de novo, based on the material in his file. The procedure for taking an appeal, transfer of appeal, recusal of appeal board members, and other procedural problems are discussed at ¶¶ 1085-89 *infra.*

1. No federal judicial district may constitutionally occupy parts of two states, given the sixth amendment command that trial of federal offenses must be in the state and district wherein the crime shall have been committed. The federal judicial districts and their boundaries are listed at 28 U.S.C. ¶¶81-131.

2. The age and length of service limits, and a specific provision stating that women are not to be denied membership on appeal boards on the ground of sex, were added in 1967.

3. There is no specific statutory authority for requiring appeal board members and local board members to be at least 30 years of age. The presence of the age requirement gives the boards an unrepresentative character in terms of the class of persons they are to judge. *Cf.* Rabinowitz v. United States, 366 F.2d 34 (CA5 1966) (jury selection). It should be underscored that the analogy between jury selection challenges and local or appeal board selection challenges is imperfect. See ¶42 *infra.*

¶42. Local Boards — Composition, Appointment, Quorums

Generally, one or more local boards is established for each county within each state, territory and possession, and in the District of Columbia. Act §10(b)(3). The boundaries of each board are established by the State Director. R1604.51. More than one board may be established for each county, and an intercounty board, consisting of at least one member from each constituent county, may be established when required for a more efficient and economical operation. Act §10(b)(3). The President's power to establish intercounty boards has been delegated to the Director of Selective Service. R1604.51. Local boards may be divided into panels by the State Director. Act §10(b)(3), R1604.52. Each board and each panel of each board must consist of at least three members. R1604.52, 1604.52a. Members of local boards are appointed

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by the President on recommendation of the appropriate governor or comparable official. They must be citizens, at least 30 years of age, residents of the county in which the board sits,[1] and not members of the armed forces. Act §10(b)(3), R1604.52. As a result of a 1967 amendment, board members may not serve for more than 25 years nor past the age of 75, nor may there be descrimination on the basis of sex in appointments to local boards. Act §10(b)(3).[2] A majority of the board constitutes a quorum for the transaction of business, and all decisions are made by majority vote.[3] The procedures followed by local boards in registering, classifying, and ordering registrants to report for induction are discussed in Part II of this Manual.

The composition of local boards, in matters other than as provided by statute, has been the subject of recent discussion.[4] Simply put, the question is: Must a local board be as representative as possible of the community it serves, as must a federal grand or petit jury? The jury analogy is concededly imperfect, for cases invalidating jury selection schemes as not productive of a "cross section" rest upon the sixth amendment[5] and upon the policy of Congress as expressed in civil rights legislation.[6] However, in interpreting the sixth amendment, courts have been careful to note that the concept of the representative jury grows and changes as our ideals of representative democracy grow and change.[7] The only policy decision at all analogous to the sixth amendment and the federal jury legislation is the §1 declaration of the Act that the system of selection shall be "fair and just," and the Supreme Court statement that selective service statutory and regulatory provisions should be interpreted in harmony with our basic concepts of fair play.[8] And of course, the right to a fair and impartial tribunal is a matter quite outside the sixth amendment jury guarantee and extends to all proceedings in which substantial rights are at stake.[9] Therefore, while the analogy of the federal jury to the draft board is speculative, it rests upon creditable legal argument.

1. In Jessen v. United States, 242 F.2d 213 (CA10 1957), the court held that a board need not exist wholly within the limits of one county, and that therefore classification of registrant was not invalid because the board's jurisdiction extended two blocks into adjoining county. The court upheld an induction order founded upon a I-A classification by a board whose chairman lived in the county when appointed, but had subsequently moved outside the county and continued to serve on the board. The court based its decision upon the theory that the chairman remained a "de facto" officer whose acts were valid as against third parties. However, it should be noted that the decision can perhaps be explained upon the narrower ground that there was no showing of a quorum of qualified members being absent from any relevant deliberation or vote. Attorneys have secured agreements from the government to dismiss prosecution founded upon failures to report for induction when it could be shown that a member not qualified to serve actually participated in the deliberations rather than recusing himself. Recusal seems to be the minimum to which a registrant is entitled, by analogy to the regulations which require board members not to act at all in cases in which they have an interest. R1604.55, 1604.52(d). Of course, if recusal of one or more members left the board without a quorum qualified to act, it would not be able to classify the registrant at all, and he would then be entitled to have his case transferred to another local board. R1623.9. See, with respect to the 30 years of age requirment, ¶41, n.3.

2. Query whether a showing that local board appointments since July 1, 1967, the date of the amendment, have not reflected the respective proportions of men and women in the population would, by analogy to the jury discrimination cases, make out a prima facie case of unlawful discrimination. Would a registrant being male, have standing to make such a claim? *See* Rabinowitz v. United States 366 F.2d 34 (CA5 1966); Allen v. State, 137 S.E.2d 711 (Ga. Ct. App. 1964). See notes 4-9 *infra* and accompanying text.

3. *See* Christoffel v. United States, 338 U.S. 84 (1949), setting aside a conviction for perjury before a congressional committee upon the ground that there was not a quorum of the committee or subcommittee present when the questions were asked and the refusal to answer made; United States v. Walsh, 1 SSLR 3010 (D. Conn. 1968) (quorum and formal meeting required); *Ex parte* Robert, 49 F. Supp. 131 (N.D.Calif. 1943), holding a classification action by a local board chairman alone invalid as not made by a quorum of the board.

4. *E.g.,* National Advisory Comm'n on Selective Service, In Pursuit of Equity: Who Serves When Not All Serve? 5, 19-20 (1967); Clay v. United States, 1 SSLR (CA5 1968).

5. *E.g.,* Glasser v. United States, 315 U.S. 60, 85 (1942).

6. *E.g.,* Rabinowitz v. United States, 366 F.2d 34 (CA5 1966). *Rabinowitz* is rich in legislative and constitutional history, and should be carefully considered by every practitioner considering a challenge to board composition.

7. The sixth amendment jury trial guarantee must be construed in accordance with basic "concepts of a democratic society" unfettered by "limitations... inherent in the historical common law concept of the jury." *Glasser, supra* note 5, at 85.

8. Gonzales v. United States, 348 U.S. 407, 412 (1955).

9. *See* Tumey v. Ohio, 273 U.S. 510 (1927).

¶43. The National Security Council — II-A and Graduate II-S Deferments

The National Security Council is by a 1967 amendment, to advise the Director of Selective Service concerning "needed" professional and scientific personnel and those preparing for critical skills and occupations. §4(g). This procedure supercedes the former method of determining critical skills and occupations for pusposes of II-A deferment and graduate student deferment. See ¶1054 *infra.*

¶44. National Advisory Committee, Medical

The National Advisory Committee on the Selection of Physicians, Dentists and Allied Specialists has been created and staffed by the President as an independent body to advise the System and coordinate the work of local and state volunteer advisory groups concerning the selection of needed medical, dental and allied specialists. Act §4(j).[1] See ¶14 *supra.*

1. See U.S. Gov't Org. Manual, 1967-68, at 512. The Committee was created by Exec. Order No. 10166, 15 Fed. Reg. 6777 (1950), as amended, 15 Fed. Reg. 8557 (1950).

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¶45. Government Appeal Agent — Qualifications, Duties, Powers

A government appeal agent is required to be appointed by the President, upon recommendation of the appropriate governor, for each local board.[1] He serves without pay. Associate appeal agents may be appointed when necessary. R1604.71(b). Appeal agents and associate appeal agents must be, "whenever possible" persons with "legal training and experience." R1604.71(c). An Appeal agent or associate appeal agent may be a member of a reserve component of the armed forces, §10(b)(3), and must be a citizen of the United States, R1603.1. His duties include the giving of advice to registrants and the local board, and being "equally diligent in protecting the interests of the Government and the rights of the registrant." R1604.7(d)(5). This divided loyalty dilutes, under generally accepted agency principles, the obligation of loyalty owed to both of his nominal principals,[2] although clearly wrong or misleading advice to a registrant might, if the registrant relied upon the advice to his detriment, be a ground for invalidating an order to report for induction or for civilian work.[3]

Typically, the government appeal agent is not used much either by registrants or the local board, as the Marshall Commission documented.[4] Moreover, government appeal agents have been requested to inform Selective Service authorities of violations of the Act or regulations by registrants and non-registrants.[5] This newly-imposed duty conflicts with the statement in some System literature, *e.g.*, SSS Form 2, sent to all registrants, that the appeal agent provides "legal counsel." He clearly does not provide "counsel", as the term is customarily understood, for his relation to the registrant lacks the elements of fiduciary duty and duty not to disclose confidential communications.[6]

Despite his apparent ambiguity of role, and the small extent to which his services are employed, he has great power within the system, and can be most useful to a registrant.

The appeal agent has the power to seek reopening of any registrant's classification by setting out in writing the reasons for his recommendation that reopening is advisable. He may appeal a classification to the appeal board at any time before an order to report for induction or for civilian work is mailed to the registrant. He may, if he deems it in the interest of justice, recommend that the State Director: (1) ask an appeal board to reconsider its determination of a registrant's classification, or (2) appeal to the President. R1626.61(b). The appeal agent also has considerable informal authority, and his assistance may be enlisted informally to explain to the board legal concepts underlying a claim for deferment or exemption. See R1604.71(d)(4). The government appeal agent may, for example, be able to correct patent errors in the classification process, such as a plainly inadequate personal appearance, by persuading the local board to rectify its mistake.

1. R1604.71. An appeal agent may be directed by the State Director to serve more than one local board within a state, R1604.71(e). In the case of an intercounty board, R1604.71(b), an associate government appeal agent is required to be appointed for each county within the local board area.

2. As a practical matter, loyalty to the System may predominate over that to the registrant in the event of a conflict. See notes 5 and 6 and accompanying text.

3. *Compare* United States *ex rel* Remke v. Read, 123 F. Supp. 272 (W.D. Ky. 1954), in which a board member's failure to notify the board of the birth of a registrant's child, as he had promised to do, invalidated the order to report for induction premised upon the registrant's continuation in Class I-A. *See also* Striker v. Resor, 1 SSLR 3019 (D.N.J. 1968), holding, as an alternative ground for release of petitioner from the armed service, that the board clerk's failure to give proper information concerning the registrant's appeal right invalidated the order to report for induction. A fortiori, it would seem, misinformation given the registrant by one whose specific duty it was to advise him of his rights should be held to excuse a registrant's failure to appeal, or to take other procedural steps to protect his rights. *See* Wills v. United States, 384 F.2d 943 (CA9 1967) (failure to inform registrant his reclassification to I-A was based on delinquency excused registrant's failure to appeal to appeal board and required court to disregard administrative determination and evaluate reclassification de novo); United States v. Bryan, 263 F. Supp. 895 (N.D. Ga. 1967) (clerk told registrant, after listening to his story, it would be fruitless to appeal I-A classification or seek I-O in personal appearance; held, misinformation denied registrant due process and induction order was invalid).

4. Nat'l Advisory Comm'n on Selective Service, In Pursuit of Equity: Who Serves When Not All Serve? 28-29 (1967).

5. Letter from General Lewis B. Hershey, October 26, 1967, in News Release, Nov. 17, 1967, SSS.

6. Canon 6 of the Canons of Professional Ethics forbids a lawyer to represent conflicting interests, except by express consent of all parties. Canon 37 requires an attorney to keep his client's confidences. If, as suggested by SSS Form 2 and other System documents, a lawyer-client relationship is created between a registrant seeking advice and a government appeal agent, the appeal agent may not obey General Hershey's letter consistently with Canon 37. Informal Op. No. 1026, ABA Committee on Professional Ethics, 54 A.B.A.J. 371 (1968). Opinion 1026 also says: "If the law and regulations are construed as not to create an attorney-client relationship between the registrant and the appeal agent, and if in fact no such relationship was created in a given case, we think that it should be made clear to the registrant that facts which he discloses to the appeal agent may be reported to the draft board.

If the law is interpreted as to create a dual role on the part of the lawyer, some kind of lawyer-client relationship with the local draft board and a lawyer-client relationship with the registrant, then the discussion under the portion of this opinion dealing with the creation of a lawyer-client relationship with the registrant would be applicable."

¶46. Advisors to Registrants — Qualifications, Appointment, Posting of Names

Each local board may have, in addition to its government appeal agent, one or more unpaid "advisors to registrants," who must be at least 30 years of age. Advisors are appointed by the Director on recommen-

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dation of the State Director, to assist registrants in filling out forms and to advise them of their "liabilities" under the Act. R1604.41. Advisors must, like other System personnel, be citizens, R1603.1, and they may be members of a reserve component of the armed forces, § 10(b)(3). There is no requirement that advisors have legal training. The names and addresses of the advisors within the local board area must be posted in the local board office, R1604.41, although courts have reached different conclusions as to the impact of a failure to post the names.[1] These cases should however, be read against the realization that the regulation permits, but does not require (as it did until 1955), their appointment.

1. Steele v. United States, 240 F.2d 142 (CA1 1957) (government must prove failure to post list was nonprejudicial; failure to do so requires reversal); United States v. Schwartz, 143 F. Supp. 639 (E.D.N.Y. 1956) (failure to post names invalidates order to report for civilian work, defendant may not have been able to find out his rights regarding his exemptions; government must prove list was posted; strict compliance with regulations required); Chernekoff v. United States, 219 F.2d 721 (CA9 1955) (failure to post names denies due process); United States v. Capehart, 141 F. Supp. 708 (N.D.W.Va.), *aff'd*, 237 F.2d 388 (CA4 1956), *cert. denied*, 352 U.S. 971 (1957) (list of advisors available for the asking though not posted; registrant knew his rights anyway, so failure to post not prejudicial); United States v. Manns, 135 F. Supp. 624 (N.D. Ill. 1955), *aff'd*, 232 F.2d 709 (7th Cir. 1956) (registrant never sought advice, knew his rights; failure to post list not prejudicial; posting not an inherent element of fair procedure); Rowton v. United States, 229 F.2d 421 (CA6), *cert. denied*, 351 U.S. 930 (1957)(semble). *See also* United States v. Wenner, 134 F. Supp. 447 (M.D. Pa. 1955), *aff'd*, 234 F.2d 71 (CA3), *cert. denied*, 352 U.S. 908 (1956) (appointment and posting of list of advisors not constitutional requirement). *See* Note, 114 U.Pa.L.Rev. 1014, 1030-31 (1967).

¶ 47. Medical Advisor -- to State Director, to Local Board

Appointed by the President, on recommendation by the governor, the Medical Advisor, a physican, advises the State Director as to the physical and mental conditions of registrants. R1604.31. An appeal board should be urged to use his services in reviewing the file of a registrant claiming a I-Y or IV-F classification.

Medical advisors to local boards are appointed by the President from qualified physicians recommended by the governor. Each local board may have more than one medical advisor, and any advisor may be authorized by the State Director to perform his function of advising on the physical and mental condition of registrants for any local board in the state. R1604.61. A medical advisor must be a citizen of the United States. R1603.1. He examines registrants referred to him by the local board of its own motion, 1628.2(a), and registrants who claim to have a disqualifying physical or mental defect enumerated in a list prescribed by the Surgeon General of the Department of the Army, R1628.2(b), and reports his findings to the board. R1628.3.[1] He does not conduct preinduction physical examinations. See ¶¶1108-13 *infra* concerning physical disqualification.

1. Except he may not advise the board concerning the condition of any registrant related by blood or marriage within prescribed degrees, or any employee, employer or close business associate of his. R1604.62.

¶ 48. Clerical Employees of Local Board

The clerical employees of the local board are civil service employees, R1605.1, and are typically appointed by the State Director of Selective Service, R1605.31. A clerical employee with supervisory duties is, as a result of a 1967 amendment to § 10(b)(4), termed an "executive secretary," but may hold that position for no longer than 10 years unless reappointed. § 10(b)(4). Formerly such employees were usually designated "chief clerk." While the clerk's functions are nominally restricted to signing forms and letters on behalf of the local board and providing information to registrants and the public, in practice he or she may exercise considerable discretion in the classification process. Many reported cases concern clerk's assuming functions reserved to board members, and when such arrogation prejudices a registrant, it may excuse a failure by the registrant to take a procedural step or invalidate an order to report for induction or for civilian work.[1]

1. See cases cited at ¶45 n.3, dealing with effect of misinformation given by clerk upon classification process. These cases may be read for the proposition that the clerk may not, by informing the registrant that appeal is futile or unauthorized, short-circuit the registrant's procedural rights to have the local board or appeal board –not the clerk– determine his status. The cases also indicate the extent to which clerks, untrained in the law and partial to the System, guide registrants to make important decisions. It is reported by attorneys practicing in the field that many local boards make some classification decisions without a formal meeting, on the basis of a telephone call to each board member from the clerk and an oral summary from the clerk of the registrant's claim. *Compare* United States v. Walsh, 1 SSLR 3010 (D. Conn. 1968). SSS forms require signature by the board chairman, or may be signed by the clerk only under board authorization. If the clerk should sign such forms, or sign them without authorization, courts have generally held that the registrant was not projudiced, and have refused to invalidate the board action reflected in the form. *E.g.*, United States v. Lawson, 337 F.2d 800 (CA3 1964), *cert. denied*, 380 U.S. 919 (1965) (rubber stamp signature); Talcott v. Reed, 217 F.2d 360 (CA9 1955). Kent v. United States, 207 F.2d 234 (CA9 1953) (induction order signed by clerk); Fratrick v. United States, 140 F.2d 5 (CA7 1944) (order to report for civilian work signed by clerk); Smith v. United States 157 F.2d 176 (CA4), *cert. denied*, 329 U.S. 776 (1946) (induction order signed by clerk); United States v. Van Den Berg, 139 F.2d 654 (CA7 1944) (order to report for civilian work signed by only one board member; United States v. Gormly, 136 F.2d 227 (CA7 1943) (order to report for civilian work not discretionary under facts of case, and need not be issued by board in formal meeting).

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A. Scope Note

¶1001. Scope Note

This part of the Manual, ¶1001-2000, deals with the Selective Service process from the 18th birthday of the person required to register up to the proceedings at the examining and induction station, or the order to report for civilian work in the case of a conscientious objector. Not discussed are invocations of the criminal process (Part III), or civil suits, preinduction or post-induction, brought to challenge classification practices (Part IV), or military law problems (Part V). The materials in this Part should be read in conjunction with those in Part I. For example, if it is suggested at any point that the government appeal agent be contacted, the user of this Manual should consult ¶45, which deals generally with the powers, qualifications and duties of government appeal agents.

B. The Administrative Process Generally

¶1002. The Administrative Process Generally

Central to the process of classification is the presumption of availability for induction provided by R1622.10: "In Class I-A shall be placed every registrant who has failed to establish to the satisfaction of the local board . . . that he is eligible for classification in another class." This presumption is reinforced by the rule that "No classification is permanent," R1625.1, and by a series of rules requiring registrants to act within specified time periods to report information to their boards, to request personal appearances, to explain their requests for classification lower than I-A, and to appeal from adverse determinations.[1]

Timely and informed action could scarcely be more imperatively demanded. It is dangerous for a registrant to act without authoritative guidance. What he may remember from a one-time encounter with the regulations, or may have heard from a friend, is not worthy of reliance. The advice of a board member, a clerk, or a government appeals agent, cannot be blindly followed.[2] The registrant needs competent, timely, and independent counsel.

1. While many cases make reference to the plight of the legally untutored registrant and decline to penalize the registrant for minor missteps, *e.g.,* Simmons v. United States, 348 U.S. 397, 404 n.5 (1955) ("registrants are not to be treated as though they were in formal litigation assisted by counsel"); United States v. Bryan, 263 F. Supp. 895, 899 (N.D. Ga. 1967), many other courts have required of registrants not only such nontechnical duties as being truthful before their boards, United States *ex rel.* Pasciuto v. Baird, 39 F. Supp. 411 (E.D.N.Y. 1941), but also that they take appeals on time, request personal appearances unambiguously and in writing, and otherwise diligently protect their own rights in the tortuous maze that is the classification process. *E.g.,* Frank v. United States, 236 F.2d 39 (CA9 1956) (refusal to reopen justified because registrant's letter asked for "personal appearance" rather than reopening on conscientious objector claim); Capson v. United States, 376 F.2d 814 (CA10) *cert. denied* 389 U.S. 901 (1967) (failure to exhaust administrative remedies of appeal bars review of classification in criminal prosecution). *But see, e.g.,* Townsend v. Zimmerman, 237 F.2d 376 (CA6 1956) (per Stewart, J., now Mr. Justice Stewart) (oral notice to board chairman of change in status tantamount to request for reopening; injunction issued); Wills v. United States, 384 F.2d 943 (CA9 1967) (failure to send Delinquency Notice – SSS Form 304 – before or with Notice of Classification to I-A excuses failure to appeal).

2. See cases cited at ¶45 n.3.

C. Counsel in Selective Service Proceedings

¶1003. Counsel in Selective Service Proceedings –– Is There A Right? –– Procedural Informality and Procedural Fairness

R1624.1(b) provides that "no person may be represented before the local board by anyone acting as attorney or legal counsel." This provision has been held valid as against fifth and sixth amendment challanges,[1] although the majority of these cases were decided prior to the revolution in right to counsel, and rest on a mechanical repetition of the "administrative–criminal" distinction. The regulations may not, moreover, bestow an absolute prohibition on activity by counsel. For example, if a registrant can not attend before the board due to illness or distance from the board, someone should be able to appear for him and

1. See Note, Fairness and Due Process Under the Selective Service System, 114 U.Pa.L.Rev. 1014, 1029-34 (1966); Steele v. United States, 240 F.2d 142 (CA1 1956) (held, no constitutional right to advisors but government must prove beyond a reasonable doubt that failure to follow regulation by appointing advisors and posting their names was non-prejudicial.); United States v. Sturgis, 342 F.2d 328, 332 (CA3), *cert. denied,* 382 U.S. 879 (1965).

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an attorney is the most logical person to perform that task.[2] Moreover, the board has discretion to permit others than the registrant to appear with the registrant, R1624.1(b), and if someone admitted to the bar wishes to attend to answer the board's questions about points of law arising in the course of the appearance, or to observe and monitor the fairness of the proceedings, the board might use its discretion to permit that.[3] Of course, there is no prohibition on an attorney advising or counseling a registrant with respect to his rights under the law, and attorneys may and often do write to and meet with board members, clerks, appeal agents, and other Selective Service officials on behalf of registrants. This form of representation is discussed in ¶1006.

Arguments based on a restrictive reading of the regulations aside, however, the denial of counsel in selective service proceedings is contrary to the accepted course of proceedings in administrative matters.[4] §6 of the Administrative Procedure Act, 5 U.S.C. §555, provides that a party to an administrative adjudicatory proceeding is entitled to be represented by counsel, as is any witness compelled to appear before any agency.[5] The APA does not, however, apply to Selective Service proceedings, except as regards publication and public information about agency functions.[6] Since typically Selective Service proceedings do not impose "punishment," it might be argued from the Supreme Court decision in *In re* Groban,[7] that there is no constitutional right to counsel in the system. Clearly, however, the system's decisions affect substantial rights. They may have great economic impact upon a registrant, perhaps compelling him to give up a valuable job or pretermit schooling which he had undertaken. When armed conflict occurs or impends, the inductee incurs the risk of serious injury or death.[8] Thus, while decisions granting the right to counsel in noncriminal and quasicriminal proceedings have appeared to turn upon the punitive nature of the process in which the right to counsel is claimed,[9] an alternative rationale easily suggests itself. If one turns away from the talismanic word "punishment" and looks instead at the practical effects of the selective service process upon life and liberty, induction or classification in a class available for induction is no less a deprivation than an adjudication of "juvenile delinquency,"[10] the imposition of an incarcerative sentence or fine,[11] or an order suspending or dismissing a student from a university.[12]

At the root of the inquiry is a question about procedural fairness. The Selective Service System does not operate on the judicial model, but rather on the investigative and inquisitorial (in a nonpejorative sense) model. In the majority of cases, it is probably permissible that it does so, for it seeks to determine facts underlying a decision with prospective effect, not to reconstruct a past event (as, for example, an alleged criminal act). In the latter case, adversary inquiry has proven to be indispensable.[13] One should be aware, moreover, that the cases which reach the courts are not the "majority", but a small minority of mostly aggravated cases in which a registrant has the courage to risk criminal prosecution or the means and will seek habeas corpus to secure his release from military service. The "judicial review law" of administrative procedure is, as Frank Newman has pointed out, unrepresentative of agency practices generally.[14] But the presence of aggravated cases and at times of clear abuses of board discretion should counsel against accepting procedural informality as an unvarying rule in Selective Service proceedings. Moreover, experience with administrative agencies generally reveals that agency practice is little affected by court decisions, particularly by decisions arising from contests before other agencies.[15] How much more this must be true of Selective Ser-

2. In *Ex parte* Fabiani, 105 F. Supp. 139, 148 (E.D.Pa. 1952) the court held that the progibition on counsel did not apply when a registrant was not able to be present to speak for himself. The registrant was in Europe pursuing medical studies. This principle might, it seems, be extended to any situation in which the registrant was a distance from his local board.

3. This suggestion is made in Note, *supra* note 1, at 1033. The use of counsel as observer with bias toward the registrant has a parallel in the role of counsel at police station lineups, where his role as defined in United States v. Wade, 388 U.S. 218 (1967) is to monitor the proceedings to deter unscrupulous police conduct and be available to testify concerning suggestive influences upon witnesses.

4. *See* Green v. McElroy, 360 U.S. 474 (1959); 5 U.S.C. §555.

5. Construed in Backer v. CIR, 275 F.2d 141 (CA5 1960).

6. Act §13(b). See §31 *supra.*

7. 352 U.S. 330 (1957). *But see* 352 U.S. at 337 (Black, Warren, Douglas and Brennan, JJ dissenting). *See* Annot., 1 L.ed 2d 1865 (1957).

8. Senator Edward Kennedy (D-Mass.), in proposing an amendment to the draft law which would suspend student deferments when the casualty rate among American military men ran above 10% or monthly draft calls, noted that the 10% rate has been exceeded during the course of the Vietnam War as of the date of his remarks, February 28, 1968. 114 Cong. Rec. S1801 (Feb. 28, 1968).

9. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), requires that when punishment is the object sought, the right to counsel, confrontation, notice and hearing such as are provided in criminal cases come into play. Specht v. Patterson, 386 U.S. 605 (1967) reached a similar conclusion concerning a sex offender commitment statute. *In re* Gault, 387 U.S. 1 (1967) held counsel to be required in a proceeding directed toward adjudication of the status of "juvenile delinquency." Mempa v. Rhay, 389 U.S. 128 (1967) held that counsel must be provided at a parole hearing which may result in the imposition of a deferred sentence. In each of these cases, the right to counsel was thrust into an area where many had assumed that it did not exist.

10. *In re* Gault, *supra.* The *Gault* right to counsel decision turned not upon a finding that delinquency proceedings impose punishment, but on the ground that "loss of liberty" could result 387 U.S. at 36.

11. Mempa v. Rhay, *supra.*

12. Sherry, *Governance of the University: Rules, Rights and Responsibilities,* 54 Calif. L. Rev. 23, 37 (1966).

13. Gellhorn & Byse, Administrative Law 664-65 (4th ed., 1960) discusses informal administrative procedure and draws the distinction between the judicial and the investigative models. But Gellhorn and Byse underline that "The extension of unconventional processes presupposes a subordinate personnel equipped to use them fairly and an administrative hierarchy fired with a sense of responsibility for scrupulously just results." Query whether the Selective Service System passes this test.

14. Newman, *The Literature of Administrative Law and the New Davis Treatise,* 43 Minn. L. Rev. 637, 644 (1959).

15. Westwood, *The Davis Treatise: Meaning to the Practitioner,* 43 Minn. L. Rev. 607, 608-09 (1959).

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vice is demonstrated by the 1967 report of the National Advisory Commission on Selective Service,[16] and may be deduced from the lack of legal training on the part of most board members.[17]

In sum, the System adamantly insists upon the use of informal procedures even in cases in which they are manifestly inappropriate, and has no inbuilt means of correcting the abuses which this situation must inevitably produce. The System personnel are interested in filling draft quotas, hence they are inappropriate persons to vest with the sole responsibility for looking out for the registrant's rights, which may sometimes be in conflict with the quota-filling interest.[18] The one person interested solely in the registrant is the registrant, and he is usually without the knowledge of System procedure and selective service law generally that is necessary to secure vindication of his rights. The provision of counsel solely interested in the registrant's welfare seems the most just solution to the problem.[19]

The right to the presence of counsel in local board personal appearances, and the formal recognition by the System that counsel can play a valuable role, would be an antidote to the System's "lawlessness." Not every registrant would bring counsel; not every problem would require counsel's presence. But rather than making a general "no counsel" rule on the assumption that in most cases counsel is unnecessary, the System's performance can best be monitored by leaving it to the registrant whether to invoke his right to have a lawyer.[20]

The denial of counsel is, therefore, a matter which ought seriously to concern the courts, and arguments based upon the foregoing line of reasoning may be adduced in cases with appropriate fact situations. It will be necessary, however, for the registrant and his attorney to stake out early and often the claim of right to counsel. In letters to the board, informal conversations reflected in memoranda placed in the registrant's file, in letters to State and National Office personnel, the claim should be pursued.

It is, of course, true that when the right to counsel has been recognized, typically recognized with it is the duty of the agency concerned to inquire whether the person subject to its jurisdiction wishes counsel.[21] No demand is necessary; rather, prerequisite to the validity of proceedings is a knowing and intelligent waiver of the right to counsel – "an intentional relinquishment . . . of a known right."[22] However, reliance upon this principle as an excuse for failing to ask that counsel be permitted to appear would be unwise under present law.

16. National Advisory Comm'n on Selective Service, In Pursuit of Equity: Who Serves When Not All Serve? 29 (1967).

17. Not only are board members not usually legally trained, but most government appeal agents do nothing to remedy the board's lack of knowledge. "Most board members barely know who their appeal agent is and cannot recall when he was last in the office." *Id.* at 28.

18. The fact that the System must, all else aside, meet induction quotas, sets it apart from other institutions. No court has a number of felons which it must convict each month, for example. This "quota-filling" insight is contained in an incisive series of articles by Ann Fagan Ginger, in Hastings Law Journal, beginning in May 1968 under the title *Minimum Due Process Standards in Selective Service Cases.*

19. *See* United States v. Wade, 388 U.S. 218 (1967). The right to counsel as the means of monitoring system performance has been closely studied in the welfare field. Welfare law decisions on termination of benefits are mostly low-visibility administrative decisions of which review is difficult to obtain and usually so time-consuming as to be meaningless. The presence of counsel is, therefore, often the only procedural device available to set up expectations of fairness and orderly procedure for the system. The identical analysis may be made of Selective Service procedure. *See* Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues,* 74 Yale L.J. 1245 (1965); Handler, *Controlling Official Behavior in Welfare Administration,* 54 Calif. L. Rev. 479 (1966).

20. This suggestion concerning the initiative for invoking the right to counsel has been made in the analogous contexts of school disciplinary procedure, Sherry, *supra* note 12, at 37, and welfare administration, Reich, *supra* note 19, at 1252-53.

21. Mempa v. Rhay, 389 U.S. 128 (1967).

22. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). *Cf.* Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest,* 54 Calif. L. Rev. 1262 (1966).

¶1004. Criminal Liability for Counseling

One limit on counseling, of uncertain extent, is the statutory criminal penalty for "counseling" evasion or refusal of service. The legal problems raised by this provision are complex indeed, particularly in time of tumult over foreign and military policy. See Part III of this Manual. However, it should be noted that the lawyer giving legal advice about selective service law is not likely to fall afoul of §12. It does not contravene public policy for anyone, particularly a lawyer, to assist a registrant seeking a deferment or exemption under the law.[1]

Advising refusal of induction raises a different set of problems. If the purpose of the advice is to place the registrant-client in a position to challenge the System's treatment of him, then the advice would not, under prevailing law, subject the attorney to prosecution.[2] Indeed, the Act now expressly recognizes

1. Spaulding v. Lambros, 58 Mont. 536, 193 Pac. 565 (1920); *In re* Arctander, 110 Wash. 296, 188 Pac. 380 (1920), both expressly dealing with the lawyer's right. In United States v. Schachtrup, 140 F.2d 415 (CA7 1944) (*per* Minton, J., later Mr. Justice Minton), the court held that neither a registrant who in good faith seeks a deferment nor one who in good faith agrees to help him to do so, may be held liable under the counseling, aiding and abetting provision of the Act.

2. Keegan v. United States, 325 U.S. 478 (1945) and Okamoto v. United States, 152 F.2d 905 (CA10 1945), which followed the prevailing opinion in *Keegan*, reversed convictions of nonlawyers who, as the evidence showed, had counseled refusal of service in the armed forces as a means of raising a "test case" or of settling the legality of conscription through litigation. A fortiori, the lawyer who advises refusal of induction should be protected.

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that judicial review of selective service decisions may be had by no means other than refusal of induction and defense of a criminal prosecution on the ground of error in a registrant's "classification or processing."[3]

A third problem is posed by analogous decisions from the field of income tax law. If a registrant tells all the relevant facts to his lawyer, receives advice, and follows that advice up to the point of refusing induction, may he defend a criminal prosecution upon the ground that he refused induction in good faith and therefore did not intentionally violate the law? A taxpayer has this defense available to him in a prosecution for tax evasion.[4] This question, not yet the subject of judicial comment in the selective service field, is discussed in Part III of this Manual, in the sections dealing with prosecutions for counselling, aiding and abetting refusal or evasion of service.

3. § 10(b)(3), as amended in 1967.

4. United States v. Pechenik, 236 F.2d 844 (CA3 1956); Jett v. United States, 352 F.2d 179 (CA6), *cert. denied,* 383 U.S. 935 (1965). The rule holds even though the lawyer is wrong on the law. Wardlaw v. United States, 203 F.2d 884 (CA5 1953).

¶ 1005. The Lay Counsellor — Group Legal Services to Registrant

There is little authority on the extent to which lay counsellors may provide advice on selective service problems, or the extent to which group legal services may be provided consistent with prohibitions on unauthorized practice. Lay counselling is nothing new, however, in the fields of real estate, tax law and estate planning: Real estate brokers prepare deeds and advise sellers and purchasers on routine technical problems, accountants prepare returns, audit books, and give advice on tax problems, and estate planners render services designed to increase the range of testamentary choices and decrease the incidence of estate taxes.[1] Courts have generally permitted these and similar activities, provided (1) they are carried out with demonstrable competency, (2) the problems being considered are not unduly complex in character, (3) there would not be adequate provision of services to the affected group if nonlawyers were not permitted to engage in advising and counselling, and (4) the person giving the advice is not in a position of representing conflicting interests.[2] It would appear that the Selective Service System concedes that laymen can provide valuable assistance, for it permits the appointment of advisors to registrants who need not be legally trained. R1604.41. As a practical matter, lay counselling can meet the criteria mentioned above and can play a valuable role. The competency of lay counsellors must, however, be upheld by the group sponsoring the counselling, as must the prohibition on giving advice in complex fact situations. The stakes are too high to permit other than the best counselling possible. One means to ensure competency and referral to a lawyer when things become too complex is to have a lawyer perform a supervisory function with respect to the counselling apparatus, to monitor its performance and to be alert for instances where his specialized skills are needed. This technique is used in many poverty law programs which use law students supervised by lawyers in this manner.[3] The last two criteria – unavailability of other services and no conflict of interest – are present in the typical counselling situations. First, there is a dearth of facilities for advising registrants. Second, only a counselling center independent of the Selective Service *lacks* the conflict of interest which every government appeal agent has. See ¶45 *supra.*

Counselling centers and lawyers who provide services on a group basis may, however, find themselves questioned by local bar associations. The Supreme Court has acted to clarify legal issues in this area and to hold that activities not unlike those of counselling organizations – at least those with attorney supervision – to be protected by the first amendment. In *NAACP v. Button,*[4] the Court upheld the activities of the NAACP in urging members and nonmembers to seek vindication of their rights by using the services of attorneys retained and paid by the NAACP. The Court noted that the solicitation was not for private gain and there was little likelihood of conflict of interest between the association and those solicited because of the lack of monetary stakes involved. In *Brotherhood of R.R. Trainmen v. Virginia State Bar,*[5] the Court held that a union might permissibly refer its members to a specific list of attorneys as a means of protecting the union members from lawyers who charged too much and reducing the number of uncompensated on-the-job injuries. To the same effect, upholding a plan whereby the union itself retained and paid a lawyer to handle members' workmen's compensation claims, is *UMW District 12 v. Illinois State Bar Assn.*[6] Legal services

1. Comment, The Unauthorized Practice of Law by Laymen and Lay Associations, 54 Calif. L. Rev. 1331 (1966).

2. *Id. See* NAACP v. Button, 371 U.S. 415, noted at 63 Colum. L. Rev. 1502 (1963); 72 Yale L.J. 1613 (1963).

3. The most exhaustive bibliography to date on this problem is contained in Justice Douglas' dissent from dismissal of the appeal in Hackin v. Arizona, 389 U.S. 143 (1967). *See also* Zimroth, *Group Legal Services and the Constitution,* 76 Yale L.J. 966, 968 (1967), noting that legal services programs involving nonlawyers have withstood legal challenge in Texas and California. The argument for lay participation in law practice is ably made in Cahn & Cahn, *What Price Justice: The Civilian Perspective Revisited,* 41 Notre Dame Lawyer 927 (1966).

4. *Supra* note 2.

5. 377 U.S. 1 (1964).

6. 389 U.S. 217 (1967).

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programs which fall within the limits set in these cases, including those set up by organizations, colleges, and unions, are probably permissible, but questions of state law predominate and should be carefully researched.[7]

7. *See, e.g.,* Hackin v. Arizona, 389 U.S. 143 (1967), dismissing appeal from conviction under statute proscribing practice by nonlawyers; Miller & Daggitt, *The Urban Law Program of the University of Detroit,* 54 Calif. L. Rev. 1009 (1966), concerning law student participation in a Michigan program; Comment, *supra* note 1, summarizing law from many jurisdictions.

¶1006. What Can the Lawyer Do?

The intercession of counsel may and often does have a practical impact upon the system. If the board knows a lawyer is in the picture, it will often be more careful in considering the registrant's claim. The board may be persuaded to abandon an untenable position if counsel intercedes. If the board is adamant, then letters to the legal personnel in the State Director's office, or to the General Counsel in Washington, D.C., will sometimes produce informal or formal intercession from those quarters. See ¶¶37, 40, *supra*

First, of course, the lawyer's job is to know his client – the registrant, or some other person entitled to ask for an exemption or deferment. In an initial interview, the lawyer should explode misconceptions by discussing the registrant's status with him informally, to determine his attitudes toward the draft and his impressions regarding his rights. He should then, if his client is the registrant, take down in writing a complete personal history, touching upon each area in which information relating to classification might be obtained: age, family history, persons whose support he contributes to, education, employment, health history, citizenship, armed forces service, attitude toward war and organized armed conflict, police contact (arrests, convictions, pending charges), and Selective Service history. Some practitioners suggest that the lawyer or counsellor review *each* potential classification, at least raising and mentioning each one to make sure no possible basis for deferment or exemption is omitted. The registrant should be asked to go to his board, or authorize someone else to do so, R1606.32(a)(1), and get a copy of his file. Sometimes, it is possible to make a photocopy, If it is not, the registrant or his designee should make a copy of everything in the file, summarizing where possible. The attorney can review the summaries and see if more information is needed. But if the summary method is used, a complete inventory of everything in the file should be obtained. Only with all the information in hand should the attorney begin to give legal advice.

D. Registration Requirements and Procedures

¶1007. Who Must Register? —— Exemptions From Registration[1]

Every male citizen of the United States, and every male person "now or hereafter in the United States," who on the day or days fixed by presidential proclamation for registration is between 18 and 26,[2] must register, subject to exemptions listed below. Generally, an exemption from registration lasts only so long as the cause for it exists.[3] Proclamation No. 2799, July 20, 1948, implemented this requirement when it was first enacted in 1948. Every male meeting the statutory definition, not exempt, and born after August 30, 1922, is now required to be registered.

Armed Forces – The first set of exemptions from registration is for members of the armed forces on active duty, including: (1) officers, pay clerks, and enlisted men in the Army, Navy, Air Force, Marines, Coast Guard, and Environmental Science Services Administration; (2) cadets or midshipmen in the U.S. Army, Navy, Air Force or Coast Guard Academies, or students enrolled in an officially-approved officer procurement program at a military college; (3) members of the reserve units of the armed forces and the Coast Guard, and midshipmen, Merchant Marine Reserve, United States Naval Reserves; and (4) Commissioned officers of the Public Health Service and reserve officers of the PHS while on active duty and assigned to the offices and bureaus of the PHS or to the Coast Guard, Bureau of Prisons of the Justice Department, or En-

1. See also ¶19 *supra* for a discussion of the statutory exemption scheme. This and the following paragraph rely heavily upon Hermann, *Who Must Possess a Registration Certificate And a Notice of Classification? Who Is Required to Register?* unpublished memo for Yale Draft Law Seminar (April 1968), on file, Yale Law Library and SSLR.

2. Except that doctors, dentists, and allied medical specialists are liable for registration through age 35. See note 7 *infra.*

3. R1611.3, 1611.4, 1611.5.

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vironmental Science Services Administration. Act § §6(a)(1), 6(a)(2).[4]

Aliens A second exemption is granted to certain aliens. See LBM 16. The general duty of aliens to register derives from the language of §3, "every other male person now or hereafter in the United States,"[5] and between 18 and 26 on a day fixed for registration. §6(a) further defines the duties of aliens. No alien admitted for permanent residence is exempt under any statutory or regulatory alien exemption. Act §6 (a)(1).[6] And, as a result of a 1967 amendment designed to secure the services of alien doctors, dentists and allied medical specialists who entered the United States after attaining the age of 26, persons in these categories are made liable for registration and service to age 35. §6(a)(1).[7]

The Act, §6(a), also exempts from registration and service "foreign diplomatic representatives, technical attaches of foreign embassies and legations, consuls general, consuls, vice consuls, and other consular agents of foreign countries who are not citizens of the United States, and members of their families,"[8] as well as "persons in other categories to be specified by the President who are not citizens of the United States. The "other categories" are specified in R1611.2(b). They exempt persons (and usually the spouse, minor children and service staff of such persons) admitted into this country under any one of certain provisions of §101(a)(15) of the Immigration and Nationality Act. These include: (1) employees of foreign governments, R1611.2(b), R1611.2(b)(1); (2) employees of a "public international organization," R1611.2(b)(2); (3) persons admitted under the 1961 Cultural Exchange Act, R1611.2(b)(5); students pursuing a full course of study, R1611.2(b)(7); and representatives of foreign press media, R1611.2(b)(10). Other separate categories include: persons entering this country under § 11 of the United States agreement with the UN regarding UN headquarters,[9] R1611.2(b)(3); members of a group admitted to this country as seasonal migrant workers who continue to be employed in such work, R1611.2(b)(4); persons entering the United States pursuant to §201 of the Information and Educational Exchange Act, R1611.2(b)(6);[10] nationals of a country which has an agreement with the United States exempting such nationals from military service while in this country, R1611.2(b)(8);[11] and persons entering the United States pursuant to certain agreements among NATO member nations, R1611.2(b)(9).

Presidential Proclamation No. 2915 (Dec. 27, 1950), issued before the word "residing" was deleted from section 3 of the Act (see note 5, this paragraph), also exempted "(f) other aliens whose admission to United States is for a temporary stay only." This has been supplanted for all practical purposes by R1611.5, which is based on an interpretation of the present wording ("now or hereafter") of section 3 and not, as before, on some legalistic concept of "residency." This regulation requires registration of those males who are neither citizens nor exempted by R1611.2, and who enter this country after the time fixed by Presidential proclamation "for the registration of a person of his age." In effect, this means that any alien over eighteen born on or after August 31, 1922, has six months from the date he enters this country within which to register. "Now or hereafter" and "temporary stay only," as concepts outlining a registration-free grace period for an alien who is not otherwise exempted and who has not declared an intention to become a citizen, mean six months. This is true regardless of the alien's present age. R1611.5.

4. Prior to 1967, reserve officers of the PHS were given a blanket exemption. A 1967 amendment created the present list of tasks which qualify a reserve PHS officer for exemption. The purpose of the limitation was to end the exemption for PHS reservists providing medical services for the Peace Corps, the Office of Economic Opportunity and the Food and Drug Administration. H.R. Rep. No. 346 (Conf.), 90th Cong., 1st Sess., at 10-11 (1967). A savings clause in the amended §6(a)(2) permits a continued exemption for PHS reserve officers assigned prior to July 1, 1967 to active duty other than in a place specified in the current version of the subsection. This clause is designed to permit those assigned under the prior law to continue to enjoy their exemption. *Id.* at 11. One exempted on grounds of active service in the military, the PHS or the Environmental Science Services Administration, must register within 30 days after leaving active duty, provided that but for his active service he would have been required to register "on the day or days fixed for his registration by Presidential proclamation." R1611.4. LBM 70 supplements, and perhaps alters the plain meaning of R1611.4, and provides that while members of reserve components of the Armed Forces, the Coast Guard, and "certain members" of the PHS are exempt only while on active duty, members of the regular components of the Army, Navy, Air Force, Marine Corps, Coast Guard, ESSA, and PHS are to be exempt while on active duty and "after they are retired."

5. The words "now or hereafter" were substituted by a 1951 amendment, 65 Stat. 75, for the word "residing." The latter word had raised difficult questions of judgment and had been the subject of litigation. Benzian v. Godwin, 168 F.2d 952 (CA2), *cert. denied*, 335 U.S. 886 (1948); United States v. Haug, 150 F.2d 911 (CA2 1945). 1939 Ops. AG 504.

6. Rumsa v. United States, 212 F.2d 927 (CA7), *cert. denied*, 348 U.S. 838 (1954).

7. See ¶ 19 n.3 and accompanying text. Although the proviso extends registration liability to all persons in medical, dental and allied specialist categories, its principal impact will be upon aliens. Most doctors or dentists receive deferments under the Act to continue their professional education, and are therefore liable for induction to age 35. If in the United States at any point since reaching 18, these alien medical personnel would have registered and will be subject to induction if they remain in the United States. An alien who arrives in this country after reaching age 26 and who has never registered or been deferred would not, prior to 1967, have been liable for registration and would therefore have been exempted from induction. The legislative history of the 1967 amendments addresses the concern of §6(a)(1) to precisely this situation. S. Rep. No. 209, 90th Cong., 1st Sess., at 5 (1967).

8. *Cf.* R1611.2(a)(9).

9. 61 Stat. 756, Aug. 4, 1947.

10. 22 U.S.C. §1446. This Act is now supplanted by the Mutual Educational and Cultural Exchange Act, 75 Stat. 527, 22 U.S.C. §2452(a), but the regulation automatically applies to the new Act. 75 Stat. 538, 22 U.S.C. §2451(note).

11. These countries are listed in LBM 22.

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Inmates – Any person who is "an inmate of an insane asylum, jail, penitentiary, reformatory, or similar institution" and who, though subject to registration, has not previously registered is to be registered first on the day he leaves the institution. R1613.41, 1642.31. An inmate previously registered is not relieved of the requirements of the regulations while incarcerated. R1642.32.[12]

12. The regulations do not specify the classification to be given one in prison, although a typical practice is to grant a I-Y classification. Section 6(m) of the Act permits, but does not require, exclusion from service of one convicted of felony. Army regulations permit the acceptance for induction of persons convicted of crime who are not in actual or technical custody. Technical custody includes supervised probation and suspended sentence conditional upon the performance of some task. However, the Department of Defense will consider for acceptance convicted felons who are on unsupervised probation, who have received unconditional suspended sentences, or who have received conditional suspended sentences but have fulfilled the condition. See AR 601-270, § 23, reproduced in the *Statutes & Regulatory Material* Section of SSLR. The Department considers each on its own facts in deciding whether to elect to accept a convicted person. See ¶ 1118 *infra.*

¶ 1008. Time for Registration.

The days for registration are set by Presidential Proclamation. The 1948 Act, the precursor to the 1967 Act, resulted in a Presidential registration proclamation of July 20, 1948, No. 2799, fixing days in August and September for registration of those born on or after August 31, 1922 up to and including September 18, 1930. Those born on or after September 19, 1930, were required to register within five days of attaining the age of 18. The duty to register is a continuing one. Proclamation No. 2799, *supra*; R1611.7(c).[1] This proclamation has been supplemented from time to time with others dealing with special aspects of registration.[2]

1. The offense of failure to register raises, therefore, difficult problems under the statute of limitations, *e.g.*, Toussi v. United States, 279 F.Supp. 473 (E.D.N.Y. 1967); Fogel v. United States, 162 F.2d 54 (CA5), *cert. denied,* 332 U.S. 791 (1947); McGregor v. United States, 206 F.2d 583 (CA4 1953), see ¶25, *supra.*

2. Presidential Proclamations Nos. 2937 and 2933 (Aug. 16, 1951), provided respectively for registration in the Canal Zone and Guam. Presidential Proclamation No. 2942 (Aug. 30, 1951), restated the first Proclamation (No. 2799, July 20, 1948) in light of a new definition of the "United States." 65 Stat. 87. Presidential Proclamation No. 3314 (Sept. 14, 1959) states that previous proclamations applying to the territories of Hawaii and Alaska still apply to them in their statehood status. Presidential Proclamation No. 2972 (April 17, 1952) provides for the registration of male citizens of the United States who had not previously registered in accordance with the terms of the first registration proclamation (No. 2799, July 20, 1948) because they were outside the United States or any of its territorial possessions. Anyone in this category who was between eighteen and twenty-six during the month of July, 1952 was required to register during that month. Anyone who turned eighteen on or after August 1, 1952 was required to register within five days of his eighteenth birthday. See R1655.1 ("Duty to Register"). Registration is to take place "before (1) any diplomatic or consular officer of the United States who is a citizen of the United States, or (2) any duly appointed registration official." Section 2(a), Presidential Proclamation No. 2972, (April 17, 1952). On the procedure involved, see LBM 73. LBM 73 specifies that no registrant registered outside the United States in accordance with Part 1655 of the regulations shall be ordered to report for induction or for his preinduction physical unless and until he enters the United States. Therefore, one who registers under Part 1655 and who remains outside the United States until he is 26 would, upon reentering this country, be immediately eligible for placement in Class V-A, since he would never have received a deferment under the Act. See Smith, *How Lawyers Can Help Clients In The Classification Process,* 25 (Nat. Law. Guild Practitioner) 80, 83 (1967).

Proclamation No. 2792 does not mean that any male citizen who, but for the fact that he was outside of the United States at the time of the first registration, would have been required to register, may avoid registration because he has turned twenty-six before the registration date named by this proclamation. R1655.2(b); section 2(c), Presidential Proclamation No. 2972 (April 17, 1952); and section 2(b), Presidential Proclamation No. 2799 (July 20, 1948) ("... he shall do so as soon as possible after the cause for such inability ceases to exist.") A person in this situation, however, would be required to register only when and if he returned to the United States, and his maximum period of registration-free, non-indictable stay would be five days. Section 2(b), Presidential Proclamation No. 2799 (July 20, 1948).

Whether those subject to registration requirements at the time of the first proclamation (July 20, 1948), but who were outside of the United States at that time and subsequently renounced their citizenship, would be required absolutely to register upon any re-entry into this country is not specified. R1611.1 imposes the registration requirement on "every male citizen of the United States, and every other male person who is in or hereafter enters the United States. . . ." In dealing with those outside the country at the time of the first registration, the first proclamation imposed the duty to register, upon re-entry, on every "person subject to registration." At the time of this proclamation (1948), however, section 3 of the Act had a wording different from its present form and demanded registration of male citizens and "every other male person residing in the United States." See Presidential Proclamation No. 2799 (July 20, 1948). "Residing" was changed to "now or hereafter" in section 3 before the issuance of the proclamation requiring citizen registration outside the country. Significantly, that proclamation (section 1, No. 2972, April 17, 1952) specified the procedures for registration outside the United States only of "male citizens," not "persons subject to registration as of July 20, 1948." It is arguable, therefore, that if those who renounced citizenship while abroad were not required to register while abroad, they do not have to register while returning to this country on short visits (less than six months, R1611.5).

The case of the registrant who goes to Canada, renounces his citizenship, and returns briefly to the United States seems to be controlled by R1619.2(b): "... if a person has registered at a time when he was required by the selective service law to present himself for and submit to registration and thereafter has acquired a status within one of the groups of persons exempt from registration, the local board shall not cancel his registration unless authorized to do so by the Director of Selective Service." Such a person is to be placed in Class IV-C. R1622.42(d). Presumably if he has registered and his registration has not been cancelled, he must have his certificate in his possession at all times. R1617.1. If he is under 26, not in any registration-exempt status, remains in this country for more than one year, and is not a permanent resident, the question arises whether he can apply for relief from the service liability otherwise incurred at such point. If he is sufficiently an "alien" and applies for such relief, he "*shall* be relieved," Section 4(a), 1967 Act (emphasis supplied), at the price of being permanently debarred from American citizenship. The statute makes no distinction among types of aliens.

See, on "Registration of Aliens" generally, from the point of view of the Director of Selective Service, LBM 16.

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¶ 1009. Where To Register.

Registration may be accomplished at any place of registration designated by the local board chairman, and at the office of each local board on the day or days fixed by Proclamation for registration. R1613.1. It matters not that the registrant does not reside in the jurisdiction of the local board whose registration facilities he uses. He must register within the designated time and the Act and regulations are indifferent to where he registers.

¶ 1010. Domestic Registration Procedures.

The registrant, or the registrar if the registrant is unable to write, writes his name and place of residence on the Tally Sheet, SSS Form 4, and the registrar fills out the Registration Card, SSS Form 1, based on information provided by the registrant and on personal observation. The registrant then either signs his name or has it signed for him by the registrar. If the registrant is unable to write, he makes his mark, which is verified by the registrar. If the registrant is unable or refuses to sign SSS Form 1, the registrar must sign and his signature accomplishes the registration. R1613.13(c). The registrar must note on the card which, if any, of the registrant's answers he believes to be incorrect or false, R1613.14, and must sign the card in his own right. Recalcitrance is referred to in the registration regulations. R1613.16. Presumably, since the registrar may sign the unwilling registrant's name, a mere refusal to sign SSS Form 1 is not a punishable violation of a duty required under the regulations to be performed.[1] Recalcitrance – defined as refusal to cooperate, evasion, refusal to answer, or making false answers[2] – is to be verified by the registrar in the presence of witnesses, by calling the registrant's attention to the penal provisions of the 1967 Act and asking his voluntary adherence to the registration duties set out in the regulations. R1613.16.[3] In fact, noncooperators from whom the board can obtain the needed information are usually registered, not prosecuted. Although there is no case directly in point, it may be asked whether R1613.16 is designed to fulfill the same function as an overruling of a claim of privilege and refusal to answer in a contempt of Congress case, which the Supreme Court has held is prerequisite to prosecution for the refusal.[4] R1613.16 certainly provides an important notice-giving function which might be urged in defense to a prosecution for violation of registration duties set out in R1613.11-.14.

The local board before which the registrant registers is to retain his Form 1 if the registrant has given a place of residence within its jurisdiction. If the registrant has not given a place of residence within its jurisdiction, the board mails the Form 1 to the appropriate local board (if the residence is in the same state) or to the State Director. R1613.43(c). *Cf.* R1613.43(a), (b). With respect to registrants who reside outside the United States, Puerto Rico, Guam, the Canal Zone and the Virgin Islands, the regulations are internally inconsistent. R1613.12(a) directs that no registrant shall be permitted to give a place of residence outside the places enumerated above. R1613.43(b) provides that if any registrant's place of residence, as shown on Form 1, is outside any of the places enumerated, the local board shall retain the Form 1.

The regulations make special provision for the registration of inmates of prisons, jails, and asylums. See ¶ 1007 n.12 and accompanying text.

1. So held in United States v. Norton, 179 F.2d 527 (CA2 1950) (registrant who was not proven to have refused to give information required to fill out SSS Form 1, but merely to have refused to sign, cannot be prosecuted in light of R1613.13(c) and fact that failure to sign does not "obstruct or delay registration"). *But see* Michener v. United States, 184 F.2d 712 (CA10 1950) (conviction affirmed; defendant went to board and said he refused to register and dissented from clerk's offer to register him.

2. The registrant would be liable to be prosecuted for refusal to register and/or to perform a duty required under the Act if he refused to give required information or gave false information. *But see,* Michener v. United States, note 1 *supra*; United States v. Rubinstein, 166 F.2d 249 (CA2), *cert. denied*, 333 U.S. 868 (1948) (discussing difference between false statements giving rise to liability and those not); ¶ 25 n.7 and cases there cited. The Rubinstein case held that a false statement on which the registrant stated at the time of making it he did not intend to rely could not be a basis for prosecution under § 12 of the Act. Query, whether by extension of this principle a statement which the registrant's appearance belied and which the clerk could correct by making an appropriate entry, R1613.14, would also be immune from prosecution under the Act.

3. Would a registrant be able to refrain from answering questions which might tend to incriminate him? *See* Albertson v. SACB, 382 U.S. 70 (1965); Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968). The question is open in selective service law. *See* United States v. Toussie, 279 F.Supp. 473, 1 SSLR 3062 (E.D.N.Y. 1967).

4. *E.g.*, Quinn v. United States, 349 U.S. 155, 165-170 (1955), holding that when the invocation of the privilege is sufficient to put the Committee on notice of the witness's claim, then the Committee must overrule the claim and seek further particularization of it if later it wishes to charge the refusal and claim of privilege to have been insufficient. If it does not do so, the defendant's alleged contumacy lacks the required criminal intent.

¶ 1011. Foreign Registration Procedures

Part 1655 of the regulations describes the procedure for registration of male citizens required to register who are outside the United States on their 18th birthday. R1655.1. Each such person is to submit him-

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self within five days of his 18th birthday, R1655.2(a),[1] or as soon thereafter as possible if unable by virtue of circumstances beyond his control sooner to do so, R1655.2(b), to any diplomatic or consular official of the United States, who is a U.S. citizen (all of whom are designated chief registrars), any other chief registrar designated by the Director, or any registrar designated as such under R1655.3 by a chief registrar. R1655.2(a), 1655.3. The procedure for registration differs but slightly from that for domestic registration as described in ¶ 1010.

The registrant abroad fills out an SSS Form 50 in the same manner and under the same procedure provided for filling out a Form 1 in domestic registration. R1655.4. The registrar transmits the completed form to the chief registrar, who in turn transmits it to the Director. The Director passes the form along to the local board having jurisdiction over the registrant, R1655.4, which fills out a Form 1 from the information on the Form 50. R1655.5.[2]

1. The preceding sentence describes the registration procedure generally applicable to those who reached 18 after July 31, 1952. The rather complex development of the present registration system, and the procedure for those who turned 18 before July 31, 1952, is described at § 1008 n.2. The provisions exempting citizens resident abroad who register abroad from physical examination and induction are discussed *id.*

2. A registrant who registers abroad and gives as his residence a place other than in the continental United States, the State of Alaska, the State of Hawaii, Puerto Rico, the Virgin Islands, Guam, or the Canal Zone, shall be assigned to Local Board No. 100. R1655.5. Board 100 has apparently never had a call for induction made upon it.

¶ 1012. Preparation of Registration Certificate –– Selective Service Number

After giving him a Selective Service number, the board mails each registrant his Registration Certificate, SS Form 2. The number given each registrant is unique to him. It consists of four elements: The first element, reading left to right, indicates the state, territory or possession in which the local board is located. R1621.2(b). The second element is the number of the local board. R1621.2(c). The third element is the last two digits of the year the registrant was born. R1621.2(d). The last element is assigned to the registrant based on his date of birth within the year of his birth, the lowest number going to the oldest registrant. R1621(2)(a). Departures from this numerical sequence are sanctioned for late registrants and to accomodate late receipt by a registrant's board of Form 1. R1621.2(e).[1] These departures from the form mean that SSS numbers are not reliable guides to the respective ages of registrants. To the extent, therefore that there is a variation, board action in reliance upon the numerical listing would be unlawful. This problem is particularly acute in setting up the order of call for those classified I-A, I-A-O, and I-O.[2]

1. The board is also to make a Classification Record, SSS Form 102, for each year's registrants, listing the registrants in the order of their Selective Service numbers, together with other pertinent information on classification action. R1621.6(a). Also, each month the board files a "List of Registrants," SSS Form 3, with the State Director, retaining a copy. The list indicates the names and other data concerning each person who has registered during the preceding month, and each person for whom a registration card has been prepared. R1621.5. On the Classification Record, the Board is to note in red ink the number of any registrant whose name does not appear in the order in which he was born. If, for example, a registrant has registered late and his Selective Service number does not indicate his date of birth in relation to the dates of birth of other registrants, his number would be inked in at the appropriate place. R1621.6(b).

2. Failure to follow the order of call –– oldest first from 26 on down after delinquents and volunteers –– invalidates an order to report for induction or for civilian work, although courts are in disagreement as to whether the government must prove in its case that the order of call was followed. Compare United States v. Lybrand, 279 F. Supp. 74 (E.D.N.Y. 1967) (government has burden of proof), with Lowe v. United States, 389 F.2d 51 (CA5 1968) (order of call presumed correct).

¶ 1013. Registration Certificate – Possession Requirement.

The board is to mail each registrant his registration certificate, SSS Form 2, within five days after assigning him his Selective Service number. § 12(a) of the Act contemplates hte making of "rules and regulations . . . relating to the . . . possession of such certificate" including registration certificates and "any other" certificate issued under the Act, and prescribes a criminal penalty for violation of those rules and regulations. R1617.1 states that every person required to register must have his certificate "in his personal possession at all times," after he has registered.[1] The possession requirement has been held constitutional as

1. This wording was significantly changed in 1959. Prior to that time under the 1940 and 1948 draft acts, the regulations, R617.1, 7 Fed. Reg. 395; R617.1, E.O. 9979 (July 20, 1948), 3 C.F.R. Comp. (1943-48) 720, required possession by every person required to register, without the qualification, "after he has registered." As it stood prior to 1959, therefore, the regulation and § 12 taken together arguably authorized double prosecution of one who had not registered: once for failure to register, and once for nonpossession. The same result might be thought to be possible given the present R1617.1 provision that failure to have one's certificate in "his" possession "shall be prima facie evidence of his failure to register." This provision may be a holdover from the earlier version of the regulation. As an attempt to create, by regulation, an evidentiary presumption binding upon the courts in the event of a prosecution, there is scant authority for it in the statute. *Cf.* United States v. Lybrand, 279 F.Supp. 74, 1 SSLR 3002 (E.D.N.Y. 1967). In any case, the "presumption" makes no literal sense, for it is limited in application to those who have registration certificates, *i.e.*, registrants. Literally, therefore, the presumption is that one who has registered is presumed not to have done so if he disobeys the possession regulation. Such a presumption lacks rationality and should therefore be held void. Tot v. United States, 319 U.S. 463 (1943). As a matter of logic, however, evidence of nonpossession might be admissable as tending to show failure to register. *See* Fogel v. United States, 162 F.2d 54, 57 (CA5 1947) (dissenting opinion).

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serving a valid governmental interest in keeping track of registrants, identification of persons who have not registered, and similar adminsitrative benefits.[2] It should be noted, however, that while § 12(b) defines a number of crimes relating to the possession of certificates issued by the System, and refers to regulations dealing with the possession of certificates, it nowhere explixitly authorizes the Director or the President to prescribe a possession requirement for registration certificates. When one considers that the penalty imposed for failure to carry the certificate is five years imprisonment and a $10,000 fine, it is not inappropriate to ask whether the statute should be construed narrowly to minimize interference with personal liberty and perhaps with the privilege against self-incrimination. In any case, it is difficult to define with precision just what governmental interests are served by the possession requirement, and which of the colorable interests could not be served by other means less at odds with our notions of personal liberty.[3]

A serious question remains concerning the meaning of the term "personal possession" as used in R1617.1. The term possession has been defined in other contexts, most notably in the field of narcotics law. In a narcotics prosecution, physical custody of the narcotics by an agent or employee whose actions the principal can control is sufficient to constitute possession in the principal. Furthermore, in the words of the Second Circuit: "A person who is sufficiently associated with the persons having physical custody so that he is able, without difficulty, to cause the drug to be produced for a customer can also be found to have dominion and control over the drugs, and therefore possession."[4] Applied to the interpretation of R1617.1, this discussion indicates that one may possess his draft card even though he does not carry it. However, the regulation requires more than possession: they require "personal possession." Past versions of the regulation required the registrant to exhibit his certificate on request to law enforcement officers and other officials, a requirement deleted in the regulations as issued under the 1948 Act. R1617.1, the predecessor to the present R1617.1, contained no exhibition requirement. Whether the registrant may now satisfy the personal possession requirement without carrying his certificate and having it available to show to those who ask to see it is an open question, but deletion of the exhibition requirement permits an argument that he may. There is no decision on the point, and the cautious registrant should carry his registration certificate on his person.

2. United States v. Miller, 367 F.2d 72, 77 (CA2 1966), *cert. denied*, 386 U.S. 911 (1967); United States v. Kime, 188 F.2d 677 (CA7 1951), *cert. denied*, 342 U.S. 823 (1951). *See* United States v. O'Brien, 1 SSLR 3029 (U.S.S.C. 1968)

3. *See* United States v. Robel, 389 U.S. 258 (1967), in which the Court declined to balance governmental and individual interests, but confined its analysis to whether the means adopted to protect the nation's defense plants from spies and saboteurs were unduly broad, and the Congress was required to seek other legislative solutions to the problem which avoided entirely the conflict between the first amendment interests at stake and the nation's security. The regulations also require that the card possessed be unaltered. R1617.1. These provisions reflect explicit prohibitions in § 12(b). They may be valid quite apart from the validity of the possession requirement, just as there is a great difference between the validity of a provision requiring an act to be done and the requirement that if it is done, it be done so as not to deceive or mislead the government. Thus, in Dennis v. United States, 384 U.S. 855 (1966), the Court declined to review the constitutionality of an affidavit requirement in a prosecution for filing affidavits which were perjurious. *See also* United States v. O'Brien, 1 SSLR 3029 (U.S.S.C. 1968); Note, 81 Harv. L. Rev. 1347 (1968).

4. United States v. Hernandez, 290 F.2d 86, 90 (CA2 1961). *See also* Cellino v. United States, 276 F.2d 941 (CA9 1960). *Cf.* United States v. Hertlein, 143 F. Supp; 742 (D. Wis. 1956).

¶ 1014. Duplicate Registration Cards

A registrant who is separated from the armed forces and who does not have a registration certificate (probably because at the time of his induction or entry on active duty it was taken from him and destroyed, R1671.1), must apply for one within 10 days.[1] The local board must also issue a duplicate registration certificate to one who requests it either on the form provided for that purpose, SSS Form 6, or by letter stating whether the certificate has been lost, destroyed, mislaid or stolen "and the presentation of satisfactory proof to the local board" that the certificate has indeed gone astray. R1617.11(b).[2] The procedure for issuance of the duplicate is set out in R1617.12. If the registrant later regains possession of his original certificate, he must return it to the board. R1617.13.

1. This is a separate circumstance from that of the person getting out of the army who has never registered. Such a person must register, not merely obtain a new certificate of registration. See ¶ 1007 *supra*.

2. Again, the registrant would presumably not have to give enough information to incriminate himself on a charge of destruction or mutilation of the certificate. See ¶ 1010 n.3. See also LBM 85.

¶ 1015. Cancellation of Registration

The local board must cancel the registration of a registrant under the following circumstances: (1) If he was at the time of registration and remains a member of a group exempt from registration under R1611.2. R1619.2(b); (2) If he registered before becoming 18, and is still under 18, unless he has volunteered for induction with the consent of his parents, or has been inducted. The regulations governing these latter classes

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say that the local board "may" cancel their registrations. However, persons of these classes who are statutorily exempt from registration should be entitled under the statute to relief from having mistakenly registered. The Director also has power to direct cancellation of a registration and the taking of such other action as he wishes. Other cancellation provisions provide for the various situations which may arise when a registrant required to be registered is registered with more than one local board. R1619.12-.18.

E. Initial Classification Information — Form 100 And Other Information-Gathering Devices

¶1016. Initial Classification By Local Board — General Rules

After his registration the board proceeds initially to classify the registrant. This decision is to be taken without the registrant being present, according to the regulations. R1623.1. The registrant is automatically placed in Class I-A unless there is information justifying his being placed in a lower classification. R1622.10. The provision of such information is principally by means of the Classification Questionnaire, SSS Form 100, discussed below. R1623.2. The board must place him in the lowest classification to which he is entitled, based on the following order from highest to lowest: I-A, I-A-O, I-O, I-S, I-Y, II-A, II-C, II-S, I-D, III-A, IV-B, IV-C, IV-D, IV-F, IV-A, V-A, I-W, I-C. R1623.2. The discussion of classification below sets out the means for submitting information to the local board, the qualifications for each classification, and the rules and procedures for classification, and concludes with a discussion of the registrant's personal appearance and appeal rights.

¶1017. Form 100 — Classification Information

Form 100 is the basic document in the classification process, and the means by which the registrant initially establishes his eligibility for a classification lower than I-A. The classification questionnaire is mailed by each local board to its registrants in the order of their dates of birth,[1] or sometimes given to a registrant when he registers. The form must be returned within 10 days, unless an extension of time is granted by the board. Mailing of Form 100 operates as notice to the registrant that unless he files the form within the time specified on its face, and shows grounds for his deferment or exemption, he will be classified I-A. R1622.1(c).[2] Filling out a Form 100 is an important step, and each registrant should carefully answer each question keeping in mind possible later claims for deferment or exemption. The registrant need not be confined to the terms of the questions asked on the Form 100; he may file affidavits, depositions and other written material concerning his status. R1621.12(a). Form 100, as revised in 1967, contains 14 "series" of questions, to be signed with a certification that the answers are truthful. The series are: I, Identification; II, Military Record;[3] III, Marital Status and Dependents; IV, Family; V, Occupation; VI, Agricultural Occupation; VII, Minister or Student Preparing For the Ministry; VIII, Conscientious Objection; IX, Education; X, Statement of Alien; XI, Physical Condition; XII, Court Record; XIII, Sole Surviving Son; and XIV, Statement of Registrant. Most questions are self-explanatory, but a few are vague enough or important enough to require explanation. In general, all questions relating to grounds for deferment or exemption must be answered with great care, lest a later claim be met with an assertion that the registrant made a prior inconsistent statement concerning his status in his Form 100.

1. One who registers after those with his date of birth have been sent their Classification Questionnaires will be sent his Classification Questionnaire immediately. R1621.9.

2. This provision does not cut off the registrants right to present additional data at any time. R1622.1(c) ("the local board will receive and consider all [pertinent] information"); R1625.1 *et seq.* (reopening). However, a late claim, or a claim which contradicts information set out in the Form 100, may be regarded by the board with distrust. See United States v. Gearey, 368 F.2d 144 (CA2 1966). If one comes into possession of knowledge justifying a change in classification, he has a duty to report it to his local board. R1625.1(b); United States v. Corliss, 280 F.2d 808, 812 (CA2); *cert. denied,* 364 U.S. 884 (1960). See ¶1095-97 *infra.*

3. Except that Form 100 requires that service in armed forces other than those of the United States be set out in Series XIV.

¶1018. Series III — Marital Status and Dependents

The marital status of the registrant is important regardless of whether he lives with his wife, and a full and careful answer concerning the support, if any, provided a wife whether he lives with her or not is vital. The registrant should list all his children, legitimate or illegitimate, including stepchildren, foster children, and adopted children, whether they live with him or not. If any of his children do not live with him, he should set out in Series XIV or on separate sheets his relationship with them, and the way, if any, in which he contributes to their support. This information is important in helping establish a claim to be placed in

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Class III-A. See ¶ 1061 *infra.* Question 4 asks the names of persons wholly or partially dependent on the registrant for support. Those financially dependent should surely be listed, with an indication in Series XIV or on a separate sheet of the extent of support and the possibility of alternative provisions in the event of the registrant's induction. These persons are entitled to apply also for the registrant's deferment, R1621.12(b), and the registrant should ask them to do so. The question concerning the amount of financial support provided by the registrant may be misleading, for §6(h)(2) of the Act provides that financial support is not the sole determinant of dependency, contemplating psychological and related forms of dependency as grounds for exemption. §6(h)(1); R1622.30(d). Therefore, in answer to the support question, the registrant should discuss fully the nature of the dependency and should if possible attach statements by those claimed to be dependents. Of course, relationship by blood or marriage is not necessary to establish dependency. R1622. 30(b), discussed at ¶ 1060 *infra.*

¶ 1019. Series IV –– Registrant's Family

The registrant should list his mother, father, brothers, sisters, children (including illegitimate, stepchildren, adopted and foster children), and his parents-in-law, omitting those listed in response to the questions in Series III.

¶ 1020. Series V –– Occupation

The information under this series corroborates that given under "dependents." It may also lay the basis for a claim of occupational deferment, either at the time of registration or in the future. The "occupational qualifications" question, No. 6, and the "work experience" question, No. 7, should be answered in full, for if the registrant later enters an occupation which may qualify him for deferment, his Form 100 listing of his qualification to perform in that occupation will corroborate his assertion of "qualification or skill." R1622.23(a)(2). See ¶ 1054 *infra.*

¶ 1021. Series VI –– Agricultural Occupation

The answers to these questions will determine whether the registrant is qualified for placement in Class II-C (agricultural occupation), R1622.24; ¶ 1056 *infra.* The crucial determinants of eligibility for II-C are production substantially in excess of that required for the subsistence of the families on the farm on which the registrant works, the importance of the registrant to the operation of the farm, the availability of others in the area with like training and experience, and the devotion of the farm to production of commodities necessary to the national health, safety and interest. R1622.24. Establishing this factual information is the obligation of the registrant. See ¶ 1056 *infra;* LBM 13.

¶ 1022. Series VII –– Minister or Ministerial Student

This series asks for information which may qualify the registrant for a ministerial exemption under §6(g) of the Act. The registrant wishing to claim a IV-D exemption should make clear either that he was "duly ordained" in accord with the ritual, ceremony or discipline of his church, or that he is a "regular" minister recognized as such by his sect or group. It is important to provide substantiation of either claim, preferably in the form of letters or affidavits from responsible officials of the sect or group. A ministerial student enrolled in a theological seminary or preparing for admission into a seminary in which he has been pre-enrolled, should furnish the board information from his school indicating his academic progress and from the church or religious organization which sponsors the seminary. LBM 56; ¶ 1069 *infra.*

¶ 1023. Series VIII –– Conscientious Objector

The single question asked under this heading enables the registrant to ask for a Form 150 on which to detail his conscientious objector claim. While good ground may exist for challenging the question as failing to inform the registrant that it should be answered if he feels that he cannot, by reason of religious training and belief, fight or kill or even belong to the military at all, thus obviating a later claim by Selective Service that his failure to ask for a Form 150 should not prejudice a post-registration conscientious objection claim,

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the registrant who knows he wants to claim a I-O or I-A-O classification should request his Form 150 at the time he fills out Form 100. See ¶¶1034-48, *infra*, for a discussion of these classifications. Since the registrant will have only ten days from the mailing to him of the Form 150 to return the form, planning out his answers to its questions is vital.

The Act and regulations, as reflected in Form 100, concentrate on organized sects and groups, and upon orthodox definitions of "minister." If the registrant's full time ministerial activity is of an unorthodox character, or in the service of an unorthodox faith judged by current community standards, he should nonetheless fill out Series VII and supplement his answers in Series XIV. See ¶ 1065-68 *infra.*

¶ 1024. Series IX –– Education

The information sought in this Series may be used to classify the registrant II-S, II-A, and, in connection with other information, I-S(h) (deferred to finish high school), or I-S(c) (ordered to report for induction and deferred to finish college year). There has been some concern over the constitutionality of the student deferment provisions, upon the ground that they discriminate against those without funds to attend college.[1] The Congress has considered and rejected these claims upon the asserted ground that today every qualified student may obtain the funds to attend some college.[2] The judicial response to such claims has been similarly unreceptive.[3] But if such a claim is or may be in the offing, it does no harm to detail in Series IX the facts showing that but for his financial inability the registrant would be in college and therefore deferable.[4] In addition, and not withstanding constitutional claims, the discretion of the board may be invoked to place in Class II-A a registrant who is working to save up money to attend college in the immediate future. Such a claim should be made in Series IX, although the chances of the board granting it are remote. See ¶ 1057 *infra.* Registrants attending an evening school, a junior college, or other institution which does not grant the baccalaureate should note this fact, for the board has discretion to grant them II-A deferments.[5]

1. The New Draft Law: A Manual for Lawyers and Counselors 33, 94 (Ginger ed. 1967).

2. H.R. Rep. No. 267, 90th Cong., 1st Sess., at 22-26 (1967).

3. Talmanson v. United States, 386 F.2d 811 (CA1 1967), *cert. denied,* U.S. (1968), rejected an attack on the II-S deferment by a registrant who did not attend college, but did so upon the ground that he lacked standing to make the claim. The registrant's contention was simply that had college students not been deferred, his induction would have taken place later as there would have been a larger pool of available manpower. Thus, *Talmanson* really does not reach the invidious discrimination question squarely.

4. Similarly, the registrant might detail any other results of racial, economic, religious or political discrimination which prevent him from obtaining a position in which he would be available for deferment. The regulations do, after all, require impartiality and "equal justice." R1622.1(d). See Act § 1(c). It should not be thought, though, that raising these claims carries with it any very great chance of success.

5. The Director of Selective Service has said that "local boards may continue to consider for Class II-A those registrants who are pursuing a full-time course of study that will not lead to a baccalaureate degree. Boards are authorized to allow such students to complete their programs." Press Release, National Headquarters, Selective Service System, February 26, 1968. In addition, a student transferring from a junior college to a four-year college would be eligible for a II-S deferment. *Id.* See *Ops. Bull.* 309, reprinted in SSLR's *Statutes & Regulatory Materials* section to the same effect.

¶ 1025. Series X –– Statement of Alien

In this series, the alien registrant should set forth relevant information concerning his eligibility for exemption upon the basis of some status or condition related to his alienage. It is assumed in this discussion that the alien is properly registered, *i.e.*, not one exempt from registration as set forth in ¶ 1007 *supra.* Aliens admitted for permanent residence are liable in the same manner as citizens. *Id.* Aliens not admitted for permanent residence are required to register, unless they fall within one of the statutory or regulatory exemptions discussed in ¶ 1007, but are exempt from training and service unless they have been in the United States for a year. Aliens filling out Series X should carefully compute their time spent in the United States, and attach their calculations to Form 100. See ¶ 1064 for a fuller discussion.

¶ 1026. Series XI –– Physical Condition

The registrant should use this series to note any disease or defect which may qualify him for classes IV-F or I-Y. See ¶¶1052, 1070 *infra.* In answer to the question asking the registrant to list any "physical or mental condition which, in your opinion, will disqualify you", the registrant should carefully study the Army Surgeon General's regulations on physical and mental fitness, AR 40-501, set forth in the *Statutes and Regulatory Material* section of the Reporter. See also ¶ ¶ 1108-13 *infra.*

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¶ 1027. Series XII — Court Record

The list of offenses should of course be complete. It is not the case that any conviction of felony or other serious offense disqualifies one from selection and induction. The standards in this respect are set by the Defense Department, not the Selective Service System, and therefore conviction of a crime may have no bearing on classification.[1] Question 2, asking if the registrant is "in the custody of a court of criminal jurisdiction, or other civil authority," should be answered with reference to the technical, legal definition of custody. Custody includes but is not limited to confinement in a jail or prison, release on parole or "active" probation, or any other relationship of the registrant to civil authority which puts restriction upon his freedom of movement. As a practical matter, persons in custody will not be inducted.[2]

1. AR 601-270, set out in the *Statutes & Regulatory Material* section, provides for a waiver by the Defense Department of its right to reject for service one convicted of an offense punishable by more than one year's imprisonment, or by death. See § 6(m). This waiver is permissible. *E.g.*, Korte v. United States, 260 F.2d 633 (CA9 1958), *cert. denied*, 358 U.S. 928 (1959); United States v. Jones, 142 F. Supp. 806 (E.D.S.C. 1956), *aff'd*, 241 F.2d 704 (CA4 1957); United States v. Bouziden, 108 F. Supp. 395 (W.D. Okla. 1952).

2. AR 601-270 as modified in 1967, provides that one who is subject to only an unsupervised probation or unconditional suspended sentence is available for waiver of conviction, and therefore for enlistment or induction. One in custody, in the sense that he must report to a probation officer, or under a suspended sentence which requires him to do some task at the court's behest, would not be available for induction so long as he continues in that form of custody.

¶ 1028. Means Other Than Form 100 For The Board To Gather Information — In General

The board has other means than the Form 100 and the registrant's other statements[1] for gaining information. However, every bit of information used in the classification process must be placed in the registrant's file,[2] and there are limits upon the board's power to consider irrelevant or unverified information.[3] The registrant, or any person designated by him in writing, may inspect and copy his file during regular business hours at the office of the local board.[4] Periodically, and certainly before any personal appearance, the registrant should examine his file in preparation to rebut any information which may have been placed there without his knowledge. The information submitted by others falls into several categories.

1. In addition to the Form 100, the board obtains information from the registrant by means of his filing requests for deferment or exemption which contain information in support of his claim, *e.g.*, SSS Form 150 (CO claims). Moreover, the board may at any time request the registrant to inform it of his current status. It may, and usually does, do so by means of questionnaires and other printed forms asking detailed questions. Principal among these is SSS Form 127, the Current Information Questionnaire. *See* Shattuck *Record-Keeping Obligations of Local Boards,* 1 SSLR (1968).

2. See R1623.1(b) "Since it is imperative that appeal agencies have available to them all information on which the local board determined the registrant's classification, oral information shall not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances shall the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file." *See also* R1621.8, concerning filing of material. Board departure from the rule would invalidate its action. Estep v. United States, 327 U.S. 114 (1946) (action in violation of the regulations is beyond the board's jurisdiction); Knox v. United States, 200 F.2d 398 (CA9 1952). *See also* Service v. Dulles, 354 U.S. 363 (1957); Vitarelli v. Seaton, 359 U.S. 363 (1959), holding that administrative agencies must follow their own rules. R1623.1(b) also states the general federal rule that an agency may not rely upon matters not of record in making its decision. United States v. Abilene & Southern Ry. Co., 264 U.S. 274 (1924) (Brandeis, J.). The regulation also saps the vitality of dicta such as that in Harris v. Ross, 146 F.2d 355, 358 (CA5 1944), that the board may act on matters within its own knowledge, whether in evidence or not.

3. In Striker v. Resor, 1 SSLR 3019 (D.N.J. 1968), the court held that if the board was to consider the clerk's notations of anonymous telephone calls to the effect that the registrant was living with a woman not his wife it should indicate its reliance upon this information in a memorandum placed in the registrant's file. In U.S. *ex rel.* Lawrence v. Commanding Officer, 58 F. Supp. 933, 947 (D. Neb. 1945), the court said that board consideration of statements in a report from the Agriculture War Board implying that the registrant was attempting to evade military service and that his father had evaded service in World War I would have been improper. Generally, of course, the board must consider solid evidence, not suppositions, speculation and prejudice as the basis for classification. United States v. Washington, 1 SSLR 3008 (CA6 1968), explains this requirement. *See also* Niznik v. United States, 173 F.2d 328 (CA6), *cert. denied,* 337 U.S. 925 (1949); Dickinson v. United States, 346 U.S. 389, 396 (1953) (board must have "affirmative evidence" to disbelieve registrant).

4. R1606.32. The registrant, as may be seen, is not the only one who may examine the file. For examination of old SSS records in federal records depots, see R1670.8.

¶ 1029. Information and Claims From Others Than The Registrant

"Any person other than the registrant" may request the deferment or exemption of the registrant, and may submit information in support of the claim. R1621.12(b). Typically, such requests are made by the registrant's employer and by those who claim to be dependent upon him. See R1626.2(a). One who requests deferment of the registrant will be notified of board classification action concerning him, R1623.4(b), 1624.2(d), 1625.12, and the registrant's employer and dependents have the right to appeal from an adverse determination. R1626.2(a). Where possible, a registrant's claim for deferment or exemption should be supplemented by a claim filed independently by someone else with an independent ground for wishing the registrant deferred or exempted.

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¶ 1030. Information —— Gathering By Subpena

The local board has subpena power to aid it in obtaining information concerning a registrant. It may subpena persons to testify and to produce documents and records, and may apply to a court of the United States for enforcement of its subpenas. R1621.15. The power is seldom invoked.[1] However, a registrant who wishes information sent to the local board concerning his classification may ask the board to help him by issuing a subpena if he is unable to get the information in any other way. Testimony before the board is under oath, in the form prescribed by R1604.57, 1606.1.

1. The use of the power to call witnesses for interrogation outside the registrant's presence is of questionable validity. See Greene v. McElroy, 360 U.S. 474, 496-98 (1959), which counsels against interpretation of powers granted administrative agencies in such a manner as to deny those subject to agency jurisdiction the rights of confrontation and cross-examination. However, in the analogous field of registrant-proffered witnesses, it has been estimated that of the boards which hear witnesses profered by registrants, half hear the witnesses separetely from the registrant. Note, 114 U.Pa.L.Rev. 114, 133 n.114 (1966). The registrant is, however, ostensibly protected by the requirement that the board may not consider evidence not reduced to writing and placed in his file. R1623.1(b). See ¶ 1029, *supra,* ¶ 1072-75 *infra.*

¶ 1031. Information From Other Agencies

The board may secure information from local welfare and governmental agencies and may ask the aid of the State Director in securing information from state or national welfare and governmental agencies. R1621.14.[1] Moreover, the board will consider information from specialized agencies in considering the registrant's eligibility for a particular classification. See, for example, the procedure for cooperation with the Agriculture Department in considering II-C deferments. LBM 13. See ¶ 1056 *infra.*

1. However, it has been held that the board should not insert such information in the registrant's file without making him aware that it has done so. United States v. Kowal, 45 F. Supp. 301 (D. Del. 1942) (board error held nonprejudicial); United States *ex rel.* Goodstein v. Mallon, 61 F. Supp. 671 (D. Md. 1945) (court found registrant aware of insertion).

F. The Various Selective Service Classifications Explained and Discussed

¶ 1032. Selective Service Classifications —— Generally

The classes are set forth in tabular form in R1622.2, from Class I to Class V. The order in which the classes are to be considered for determination of the lowest class to which the registrant is entitled is set out at R1623.2 See ¶ 1016 *supra.* The discussion below sets out the qualifications for placement in each class, and should be read in conjunction with the distinction between deferments and exemptions in ¶ 19, *supra,* and with the discussion of Form 100 in ¶¶ 1017-27, *supra.*

¶ 1033. Class I-A

"In Class I-A shall be placed every registrant who has failed to establish to the satisfaction of the local board, subject to appeal . . . , that he is eligible for classification in another class." R1622.10. This regulatory definition establishes the presumptive availability of every registrant for military service.[1] Placement of a registrant in Class I-A and sending of a notice of classification triggers procedural rights of review. See ¶ 1079 *infra.*

1. The presumption of availability has been noted and upheld in, *e.g.,* Dickinson v. United States, 346 U.S. 389, 395 n.7 (1953).

¶ 1034. Classes I-A-O and I-O —— Conscientious Objection —— Legislative Definition

The conscientious objector exemption springs from section 6(j) of the Act:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code."

The section goes on to provide that one

> "claiming exemption from combatant training and service because of such conscientious objection whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found

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to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered . . . to perform . . . civilian work. . . .[1]

The meaning of the two-sentence definition of conscientious objection and the means provided by the System to claim exemption from combatant service (I-A-O) or from all military service (I-O) are discussed in the following paragraphs. Generally, as the discussion will show, the seeker after a I-A-O or I-O classification must have a "religious" belief, see ¶¶ 1035-37 for definitions, which requires him to oppose participation in secular warfare, see ¶ 1039. He need not be a member of a "peace church," his personal belief being all that is required. And the definition of "war" should be studied carefully, for it is not at all the same as "violence" or "fighting."

1. In addition to the 1967 amendment concerning "religious training and belief," discussed in ¶¶ 1035-36 *infra*, the 1967 amendments discarded the former provision for a Justice Department hearing if a CO claim was denied by a local board and by an appeal board upon a preliminary examination of the registrant's file. The former provision read as follows:

> "Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector be inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board."

The procedural incidents of the Department of Justice hearing were the subject of a great deal of litigation over the rights of registrants. Since the procedure is now repealed, there is no reason for extensive discussion in this Manual. Attorneys with cases from the period prior to the 1967 amendments may consult CCCO, Handbook for Conscientious Objectors (9th ed. 1967), available from CCCO, 2016 Walnut St., Philadelphia, Pa.. On the rights of registrants generally, see the leading cases of Sicurella v. United States, 348 U.S. 385, 392 (1955) (error of law by hearing officer vitiates appeal board action, there being no notation in file that board relied on different ground in rejecting CO application); United States v. Nugent, 346 U.S. 1 (1953) (sets out procedural rights of registrant in Justice Department hearing).

¶ 1035. Conscientious Objection — Legislative History up to 1967[1]

§ 4 of the Draft Act of 1917, 40 Stat. 78,[2] exempted only those found to be members of "any well-recognized religious sect or organization at present organized and existing" whose principles forbid participation in war "in any form" and who actually subscribed to these principles of the sect or organization, thus supreimposing upon the requirement of individual objection a requirement of membership in a "peace church." This provision was upheld against a contention that it constituted an "establishment of religion."[3] Section 5(g) of the 1940 Act, 54 Stat. 889, contained a first sentence virtually identical to the first sentence of the current § 6(j), thereby making individual belief alone the determinant of conscientious objection.[4] This provision was construed to exclude from eligibility for conscientious objector status those whose opposition to war was based upon "philosophical and political considerations,"[5] and those whose opposition was to a particular war rather than to all war.[6] In 1948 the Congress amended the conscientious objector provision to define "religious training and belief," to mean "an individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation, but . . . not . . . essentially politi-

1. The pre-World War I history of conscientious objection is contained in Selective Service System Monograph No. 11, Conscientious Objection 40-46 (1950). *See also* United States v. Seeger, 380 U.S. 163, 170-71 (1965), and for the earliest case upholding the validity of an alternative service provision, Parker v. Kaughman, 34 Ga. 136 (1865) (Confederate draft).

2. Statutes from World War I through 1965 are compiled in full text form in G. Udell, The Selective Service Act As Amended (1965), available from the Government Printing Office.

3. United States v. Stephens, 245 Fed. 956, 962 (1917), *aff'd*, 247 U.S. 504 (1918); Selective Draft Law Cases, 245 U.S. 366, 389-90 (1918).

4. The intent of the Congress in passing the provision was discussed in United States v. Seeger, 380 U.S. at 171-72. Contemporaneous authority is in accord. United States v. Bowles, 131 F.2d 818 (CA 3 1942), *aff'd*, 319 U.S. 33 (1943) (error to refuse I-O simply because registrant not a member of religious sect). The 1940 Act also instituted the distinction between noncombatant military service (which the 1917 Act had not provided for) and work of national importance under civilian direction, the latter class of work being for those opposed to noncombatant as well as combatant service.

5. United States v. Kauten, 133 F.2d 703 (CA2 1943); *see* Berman v. United States, 156 F.2d 377 (CA9), *cert. denied*, 329 U.S. 795 (1946).

6. United States v. Kauten, *supra*, note 5.

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cal, sociological, or philosophical views or a merely personal moral code."[7] The significance of the change was discussed in *United States v. Seeger*,[8] and the Court held that the religious training and belief requirement was not intended to deny conscientious objector status to those whose vaguely theistic religious outlook did not include worship of an anthromomorphic god. A discussion of *Seeger* in some detail is called for, but in the context of the 1967 Act.

7. The "Supreme Being" language was drawn apparently from United States v. Macintosh, 283 U.S. 605, 633-34 (1931) (dissenting opinion) and the rejection of "nonreligious" views from United States v. Kauten, *supra*, and Berman v. United States, *supra. See* United States v. Seeger, 380 U.S. at 172-80. In truth, the *Seeger* majority had some difficulty in concluding that Congress relied upon both *Kauten* and *Berman* and that the two cases stand for roughly identical propositions. *Kauten* reads the conscientious objector classification much more broadly than *Berman*, which hews to a more narrowly orthodox definition of religious training and belief. The evidence is strong that Congress intended in the 1948 amendments to narrow the CO classification, not (as the Court held in *Seeger*) merely to clarify its scope and meaning. However, the argument seems rather academic, since the *Seeger* holding settles the question for practical purposes.

8. 380 U.S. 163, 173-80 (1965).

¶ 1036. Conscientious Objection — The 1967 Amendment in Light of *Seeger*

The 1967 Act strikes from § 6(j) all mention of a Supreme Being, retaining rejection of "nonreligious" views as a basis for conscientious objector status. Literally, the change leaves one with statutory language which defines "religious training and belief" in terms of what it is not, thereby arguably expanding the definition of what it is or may be. The 1967 Act, as passed by the Senate, made no change in § 6(j) as it had stood since 1948. The House version eliminated the second sentence (defining religious training and belief) entirely. The House Report said this was done with an eye to preventing the *Seeger* decision from resulting in an "undue expansion" of the "basis on which claims for conscientious objection can be made."[1] The Senate-House conference produced agreement on the present formula, purportedly with the intention of "more narrowly" construing the basis for conscientious objection, and making clear what religious training and belief does not mean. In so doing, the conferees reverted, perhaps unwittingly, to a suggestion made by General Hershey in his 1967 testimony before the House Armed Services Committee.[2] Senator Russell, for the Senate conferees, stated in reporting to the Senate that the amendment did not overrule *Seeger*.[3] The result is a welter of confusion about what the Congress intended, not the least puzzling part of which is the assumption—shared by some legislators—that *Seeger* rested on the 1948 "Supreme Being" amendment having broadened the definition of "religious training and belief." But *Seeger* makes no such assertion. The Court rested, rather, upon the proposition that the Congress in 1948 intended "substantially to reenact the 1940 provision", with only a few "technical amendments."[4]

Out of the confusion, there are three possible readings of the 1967 amendments in connection with *Seeger*. First, the amendments can be read as making no change in the definition of religious training and belief, upon the ground that the legislative history is inconclusive and that even without explicit "Supreme Being" language, courts have required belief in a deity or at the least in some form of higher rationalizing principle parallel to the belief in God held by one clearly entitled to conscientious objector status.[5] Such a reading would also be consistent with the *Seeger* Court's explicit equation of the "Supreme Being" clause of former § 6(j) with the exclusion of a "merely personal moral code," as a basis for CO status,[6] and with Senator Russell's statement on the Senate floor that a Buddhist or Confucianist is entitled under the 1967 amendment of § 6(j) as under its predecessors to CO status.[7]

A second reading of the amendment is to consider that its literal language broadens the definition of § 6(j) by eliminating the requirement of belief in a "Supreme Being." A complete return to the less demanding language of the 1940 provision[8] would not, however, be warranted, because of the retained exception

1. H.R. Rep. No. 267, 90th Cong., 1st Sess., at 31 (1967).

2. The genesis of Congressional concern over *Seeger* is the recommendations of the panel on the draft headed by General Mark Clark, which regarded *Seeger* as having ignored the intent of the Congress in 1948 to narrow the basis for claiming conscientious objector status, and indeed as having "unduly expanded" it. See ¶ 1035 *supra*. Hearings Before the House Committee on Armed Services, 90th Cong., 1st Sess., at 2552 (1967). Also important in this connection is the testimony of General Hershey, which was at best equivocal on the *Seeger* case. At one point, he said that the "thing that was bad about the *Seeger* case, was people were trying to read things it didn't say." *Id.* at 2637. Earlier, however, Hershey criticized the Court for holding in *Seeger* that the "Supreme Being" clause of the 1948 Act broadened the definition of religious training and belief, when actually Congress had intended to narrow it. Hershey suggested that perhaps striking the reference to a Supreme Being would clarify the matter, but he professed to be uncertain whether the Court would construe the amendment as a further broadening of the definition. *Id.* at 2636. Thus, if the conferees did adopt Hershey's "suggestion," there is no way to tell what they expected to accomplish thereby.

3. 113 Cong. Rec. S8054 (daily ed. June 12, 1967).

4. 380 U.S. at 178, 179.

5. *Compare* Berman v. United States, 156 F.2d 377, 380 (CA 9), *cert. denied*, 329 U.S. 795 (1946) ("authority higher and beyond any worldly one") *with* U.S. *ex rel.* Phillips v. Downer, 135 F.2d 521 (CA2 1943); United States *ex rel.* Reel v. Badt, 141 F.2d 845 (CA2 1944), neither of which required belief in a deity. These cases cast doubt upon the Court's reliance, in *Seeger*, upon the earlier second circuit case of United States v. Kauten, 133 F.2d 703 (CA2 1943), which can be read consistenely with *Phillips* and *Reel* only if it is construed to preclude a selective conscientious objector classification based upon "philosophical" grounds and not an opposition to all war based upon such grounds. *Kauten* does not really bear the *Seeger* Court's interpretation of it as requiring belief in a "Supreme Being," for it deals more with selective objection then with religiosity.

6. 380 U.S. at 186.

7. 113 Cong. Rec. S8053 (daily ed. June 12, 1967).

8. ¶ 1035 *supra*.

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for political, sociological or philosophical views. A reasonable construction on this hypothesis is that, following the *Seeger* rationale, all that is required is a belief which in the life of the registrant fulfills a parallel role to that fulfilled by a clearly religious belief in the life of one concededly entitled to the exemption.[9] Whether this definition advances analysis is subject to some question.[10]

A third reading is to consider that the 1967 Act narrows the *Seeger* definition and requires not just belief in some "Supreme Being" of one's own devising, but a "religious" belief in a rather orthodox sense. Such a reading raises constitutional problems, for it discriminates between externally-compelled and internally derived beliefs in a manner held unconstitutional by at least one court.[11]

9. The *Seeger* Court held that the test of religious belief is whether the belief in question is a sincere and meaningful belief occupying in the life of its possessor a place parallel to that filled by the belief in God of those clearly qualifying for the exemption; 380 U.S. at 173-80.

10. Cogency aside, a registrant is surely entitled and probably advised to urge upon his local board that the elimination of the "Supreme Being" language from the statute broadens rather than narrows the definition of religious training and belief and thereby expands the availability of the CO exemption.

11. United States v. Seeger, 326 F.2d 846 (CA2 1964), *aff'd on other grounds*, 380 U.S. 193 (1965). The Second Circuit felt it had to face the constitutional issue tendered by Seeger's beliefs; the Supreme Court avoided the issue by its construction of § 6(j).

¶ 1037 [Vacant]

¶ 1038. Conscientious Objection — Distinctions and Discriminations in Defining "Religion"

Decided cases in quite some number reiterate uncritically that the conscientious objector exemption is a matter of legislative grace, for Congress might constitutionally subject everyone to military service. This "greater power" to conscript everyone, so the argument runs, includes the "lesser power" to make whatever distinctions the legislature may decide upon in granting exemptions and deferments. But the greater does not logically include the lesser power, however, as Thomas Reed Powell pointed out early in this century.[1] The Supreme Court early held that the power to exclude a foreign corporation from a state did not include the power to condition its entry upon the giving up of a constitutional right.[2] And beginning with the 1963 case of *Sherbert v. Verner,*[3] the doctrine of "unconstitutional conditions" has achieved new prominence in the analysis of questions quite like those tendered by the conscientious objector exemption. In *Sherbert,* the court held that just because a state might deny unemployment compensation to everyone, it could not condition the right to compensation upon a willingness to work on Saturday (while allowing persons to refuse Sunday work), for such a condition infringed upon the religious liberty of a Seventh Day Adventist for whom Saturday was a day of rest. So in the field of conscientious objection, neither the Congress nor the Selective Service System may prefer one religious belief over another, no matter how unorthodox the discriminated belief is thought to be, and subject to some minimum inquiry into the sincerity of the belief.

In the Second Circuit's opinion in *Seeger,* the court believed that it had to face the constitutional issue whether a distinction between those who believed in a "Supreme Being" and those who did not, coupled with a discrimination against members of the latter class, could survive a due process challenge. The court held not, and termed the distinction "between internally derived and externally compelled beliefs" an "impermissible classification."[4] Really, the insistence that one concededly conscientiously opposed to war demonstrate that he has a belief in an external, superhuman deity establishes in our law a preference for orthodox religiosity for which there is no justification save an impermissible assumption about the rightness of a particular type of belief.[5] This leads to a rather broader consideration of the meaning of "religious" in the Selective Service Act. The court in *Seeger* noted that its decision comported with "the ever-broadening understanding of the modern religious community."[6] The Court went on to quote Paul Tillich's affirmation of the existence of "not the God of traditional theism but the 'God above God,' the power of being, which works through those who have no name for it, not even the name God."[7] And it noted also the work of John A.T. Robinson, in which it is said that the concept of a supernatural God "out there," "is itself becoming more of a hindrance than a help."[8]

Other courts have attempted to define religion in contra distinction to secular activity. In Fellowship of Humanity v. County of Alameda,[9] the court confronted an application for tax-exemption on the part of an organization claiming to be "religious" in character. The court held that four tests must be met for an

1. Powell, The Right to Work for the State, 16 Colum.L.Rev. 99, 110-12 (1916). It is probably not true that Congress *could* conscript everybody, given the importance of CO beliefs to the practice of many religions.

2. Terral v. Burke Construction Co., 257 U.S. 529 (1922), overruling Doyle v. Continental Ins. Co., 94 U.S. 535 (1877).

3. 374 U.S. 398 (1963).

4. 326 F.2d 846 (CA2 1964). See also *Seeger,* 380 U.S. at 188 (Douglas, J., concurring). To similar effect is United States v. Carson, 1 SSLR 3046 (E.D. Ark. 1968).

5. *Cf.* Torcaso v. Watkins, 367 U.S. 488 (1961).

6. 380 U.S. at 180.

7. 2 Systematic Theology 12 (1957), quoted at 380 U.S. at 180.

8. Honest to God 15-16 (1963), quoted at 380 U.S. at 181. See also 380 U.S. at 182.83, suggesting that nearly everyone has a "religious belief." And see Fleming v. United States, 344 F.2d 912 (CA10 1965).

9. 153 Cal. App.2d 673, 315 P.2d 394 (1957), discussed in Comment, 56 Calif. L. Rev. 100, 100 n.4 (1968).

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organization to be "religious": a belief, a cult, a system of moral practices, and an organizational structure.[10] The court also insisted that religion requires a devotion to some principle, strict fidelity or faithfulness and conscientiousness.[11] This definition is not literally applicable to an individual, for the *Seeger* court itself recognized that one need not be a member of an organization to qualify for the conscientious objector exemption. But it does help to underline the expansible meaning of "religious" in contemporary society."

Religion is not simple and unidimensional. While it may be that the statutory distinction between "religious belief" and "essentially political, sociological, or philosophical views, or a merely personal moral code" cannot be drawn in the constitutional manner, harmony to constitutional principle would suggest the most expansive possible reading of "religious belief."[12] That is, whether or not the free exercise clause of the first amendment requires recognition of conscientious objector status (and an argument can be made that it does), once conscientious objection is legislative or judicially recognized, it must be defined as broadly as possible in order that the category established to define its extent does not constitute an establishment of religion. That is, conscientious objection must be given a "secular" definition.

Finally, it should be noted that a "nonreligious" basis for conscientious objection *will not defeat a CO claim,* unless it is the *only* basis for the claim.[13]

10. *Id.*
11. *Id.*
12. See also the discussion of religion in connection with the treatment of the ministerial exemption ¶1065 *et seq.* The argument over what constitutes religion has recently raged in the context of drug use. For a discussion of the legal literature, see Comment, 56 Calif. L. Rev. 100 (1968). Professor of Religion Walter Houston Clark has argued that the use of drugs may induce experiences genuinely religious in character. W.Clark, *Religious Aspects of Psychedelic Drugs,* 56 Calif. L. Rev. 86 (1968). Professor Clark defines religion as "the inner individual's experience of a Beyond, especially as evidenced by his attempts to harmonize his life with the Beyond." *Id.* at 87. This need not mean a supernatural "beyond" or a life after death. Plato's Republic was largely concerned with a clearer perception of goodness and truth which might be achieved by a form of society brought into being on this earth. The Platonic notion of escape from the "den" literally describes an experience within Professor Clark's (and many others') definition of religion. For other discussions of religion, see CCCO, Handbook for Conscientious Objectors (9th ed. 1967).
13. Fleming v. United States, 344 F.2d 912 (CA10 1965).

¶1039. Conscientious Objection — Participation in War in Any Form

"Participation in War in any form" means "participation in any form in war."[1] "In any form" thus modifies participation and not "war," and one who would use force in, for example, self-defense is not thereby disqualified from CO status.[2] One need not, that is, be a pacifist. Stated positively, the exemption embraces those who object to wars begun and directed by organized political entities on this earth, and not to theocratic wars or wars directed by some supernatural being.[3] This definition has practical significance for those, such as Jehovah's Witnesses, who would fight (albeit "non-carnally") if commanded by God to do so, and to those who would use force in defense of home, church, property, and family.[4]

Closely allied to this definition is that of the "just war," which may be one directed by political entities of this earth but which is not forbidden by God. The distinction between "just war," as that term is defined, for example, by Roman Catholics, and "theocratic war," has been rigorously drawn and those who would fight only in the former have been held not entitled to CO status under present law while those who

1. Taffs v. United States, 208 F.2d 329 (CA8 1953), *cert. denied,* 347 U.S. 928 (1954) ("The words 'in any form' obviously relate not to 'war' but to 'participation inwar.'" 208 F.2d at 331). The government petitioned for certiorari in *Taffs,* but unsuccessfully, a fact noted in an approving glance at *Taffs* in Sicurella v. United States, 348 U.S. 385, 389 n.1 (1955).
2. *E.g., Sicurella, supra;* Shepherd v. United States, 217 F.2d 942 (CA9 1955) (defense of life and home); Jessen v. United States, 212 F.2d 897 (CA10 1954) (self-defense); Taffs v. United States, *supra. But see* Bouziden v. United States, 251 F.2d 728 (CA10), *cert. denied,* 356 U.S. 927 (1958) (belief in self defense and theocratic war can be considered in determining CO claim).
3. Sicurella v. United States, 348 U.S. 385 (1955); Kretchet v. United States, 284 F.2d 561 (CA9 1960).
4. United States v. Hartman, 209 F.2d 366 (CA2 1954) (citing *Taffs*); Shepherd v. United States, note 2 *supra;* Hinkle v. United States, 216 F.2d 8 (CA9 1954), *cert. denied,* 348 U.S. 970 (1955). It has been suggested that this principle would extend to defense of one's neighborhood in the event of, for example, a civil disorder. The New Selective Service Law: a Manual for Lawyers and Counselors 50 (Ginger ed. 1967). This suggestion has merit, although it has never been squarely presented in a decided case. If a Jehovah's Witness's willingness to use force in defense of home, family, or church is not a disqualification, then the same principle should apply to the above case. Neither the defense of church nor the defense of neighborhood is "war" as that term is defined in the cases.

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would fight only in the latter have been held to be so entitled.[5]

The CO applicant should avoid being trapped, however, by questions about his belief in fighting or force. If he feels that he might have been willing to fight in World War II, for example, he need not necessarily regard himself as disqualified from CO status. Today's wars partake at every moment of the danger of nuclear annihilation, and a registrant who believes this to be so, and who believes that nuclear war is an irredeemable disaffirmation of his belief in the community of man or in the community of man and some supernatural force, may have a basis for claiming a CO exemption. Similarly, a registrant who believes that given the present direction of American foreign policy, any war in which he would be asked to fight would disaffirm religious scruples which he possesses, may be entitled to the CO exemption. No claim should be rejected without examination, and the registrant and his lawyer should not substitute their judgment for that of the Selective Service System. If the claim is denied, then at the point of deciding whether to refuse induction and test the System's action a more cautious approach is warranted, and the discussion above should be regarded as just what it is: speculation on the possible interpretations of the "participation in war in any form" language of the statute.

5. *E.g.*, United States v. Spiro, 384 F.2d 159 (CA3 1967), *cert. denied,* 390 U.S. 956 (1968); Noyd v. McNamara, 378 F.2d 538 (CA10), *cert. denied,* 389 U.S. 1022 (1967). This distinction between a war in which a personified God comes to earth and participates, albeit "non-carnally", in a military struggle (a theocratic war) and a war merely commanded or not disapproved of by a God who remains "out there" (just war) is difficult to justify. Relevant here is the expanded concept of religion discussed in ¶1038. If a man may be religious within the meaning of the Act and believe in the creation of a "city of God" on this earth, then one must ask whether and by what means the rules of such a community would be enforced. Thus, William Penn's charter for world government seems to approve of the use of force to maintain the peace, a close analogy to true "collective security" arrangements. See Sibley & Jacob, Conscription of Conscience: 1940-47, at 25 (1952). It may be that the legislature and the courts need not recognize the "theocratic warrior" as entitled to CO status, but having decided to do so, they should not be permitted to make an arbitrary distinction between him and others who also believe in the use of force when commanded or approved by God. *See generally* ¶1038. *See also.* United States v. MacIntosh, 283 U.S. 605, 627 (1931) (dissent): "There is nothing new in such an attitude [one in opposition only to certain wars]. Among the most eminent statesmen here and abroad have been those who concemned the action of their country in entering into wars which they thought to be unjustified. Agreements for renunciation of war presuppose a preponderant public sentiment against wars of agression." This discussion merges into the so-called "Nuremberg defense" to induction, discussed in Part III of this Manual.

Also supportive of the "just war" exemption is United States *ex rel.* Reel v. Badt, 152 F.2d 627 (CA2), *pet. for cert. dismissed,* 328 U.S. 817 (1946) (registrant's 1939 signing of federal employee oath to support and defend the constitution did not justify denial of CO claim).

¶1040. Conscientious Objection — The Distinction Between I-O and I-A-O

The statute provides for the same test for both I-O (objector to all military service) and I-A-O (objector to combatant service only): religious beliefs in opposition to participation in war in any form. The only point of distinction between the two beliefs is the degree to which the registrant feels that service in a noncombatant capacity, such as medical corpsman, infringes upon his beliefs. If the registrant's objection is is phrased in terms of opposition to "killing" or "carrying weapons", he will find that the board most sympathetically listens to a claim for I-A-O status. (For a definition of non-combatant duties, see LBM 32.) The cases provide little reliable guidance. There is some support for the view that a scriptural basis for conscientious objection cannot amount to more than a I-A-O, due to the absence of scriptural authority for abstention from noncombatant service.[1] However, this view has been expressly rejected by at least one appellate court, which declined to require that a registrant with a scripturally-based belief justify every element of his belief by citations to Biblical texts.[2] Said the court: "The Bible was not written with the Universal Military Training and Service Act in mind, and a verbal convergence between the two documents cannot reasonably be demanded."[3]

Another aspect of the same problem may be presented in cases where the registrant has engaged in activities which would be said indirectly to have contributed to the military effort, for example by working in a defense plant.[4] However, such work will not, of itself, disqualify a registrant from I-O status.[5]

1. Rowland v. United States, 207 F.2d 621, 626 (CA9 1953).
2. United States v. Washington, 1 SSLR 3008 (CA6 1968).
3. *Id.*
4. See United States v. Moore, 217 F.2d 428 (CA7 1954), *rev'd on other grounds,* 348 U.S. 966 (1955).
5. The Solicitor General made this concession in Brief for the United States, Parker v. United States, 372 U.S. 608 (1963) and Harshman v. United States, 372 U.S. 607 (1963), at p. 11:

> "But the critical question is one of fact - what is the registrant's objective belief? The statute leaves no room for a rule of law that willingness to engage in defense production is so incompatible with conscientious objection to military service that, despite unquestioned religious sincerity, a I-O classification may not be assigned to any person willing to work upon goods for the armed forces. By the same token, it is impermissible to jump, invariably and automatically, from evidance of willingness to work on war goods to the conclusion of a lack of a sincere conscientious objection to a noncombatant service."

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¶ 1041. Conscientious Objection — Filing Form 150

A claim for conscientious objection is initiated by asking the board to send a Form 150, Special Form for Conscientious Objectors,[1] a sample copy of which may be obtained from the System or SSLR. The board must comply with this request, regardless of when it is made. R1621.10. The Form 150 must be filled out and returned within ten days. R1621.10-.11. The form in use in 1968 stated that failure to file Form 150 within the date indicated on its face "may be regarded as a waiver" of the CO claim. This statement is contrary to that contained in LBM 41, which states that a claim of conscientious objection, whether made by Form 100, Form 150, or in a simple written statement of the registrant, cannot, once made, be withdrawn except by a freely given written statement of the registrant.[2] As a practical matter, however, compliance with the board's direction is wise. The questions on the form are in "series," each series concerning a different subject. The paragraphs below discuss each series in turn. In presenting his claim, the registrant is well-advised to put all possible bases of a claim for CO status before the board. Given the elimination of the Justice Department hearing by the 1967 amendments to the Act, the importance, in the event of later litigation over the registrant's classification, of a file filled with supporting statements and documents cannot be too much emphasized. Also the registrant should note that in such cases as *Seeger*, the victory was won principally because of the registrant's insightful essay filed along with his Form 150.

Moreover, the registrant should file Form 150 as early as possible, to give time to build his file and to enhance the credibility of his presentation when, after all lower classifications terminate, the board considers his claim.

1. Valuable advice on filling out Form 150 is contained in CCCO, Handbook for Conscientious Objectors (9th ed. 1967), and CCCO's assistance is available to registrants and their counsel at any time.

2. However, in an unwise decision, the court of appeals for the Seventh Circuit has held that false advice given a registrant by a federal officer to induce him to give up his conscientious objector claim did not warrant invalidating an order to report for induction. United States v. Mansavage, 178 F.2d 812 (CA7), *cert. denied*, 399 U.S. 931 (1950). This decision is contrary to LBM 41 and to cases holding that false and material advice by a board official will invalidate board action, see ¶ 45 n.3, and to the general rule that a waiver of a fundamental right—here the statutory right to exemption from military service—will not be valid unless knowingly and voluntarily made. Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Fay v. Noia, 372 U.S. 391, 439 (1963); Henry v. Mississippi, 379 U.S. 443 (1965).

¶ 1042. Conscientious Objection — Form 150 — Series I (Claim for Exemption)

The "claim for exemption" is made by signing either statement A, claiming exemption from combatant training and service only (I-A-O), or statement B, claiming exemption from both combatant and noncombatant training and service. See ¶ 1040 *supra*.

¶ 1043. Conscientious Objection — Form 150 — Series II (Religious Training and Belief)

The form in use as of April 1968 asked: "Do you believe in a Supreme Being?" (offering a choice of "yes" and "no" answers) and for a description of the nature of that belief and a statement whether that belief involved "duties which to you are superior to those arising from any human relation." Arguably, these questions are no longer authorized given the deletion of the "Supreme Being" standard from the 1967 Act. However, belief or disbelief in a Supreme Being may be evidentiary, as a logical matter, of "religious" as opposed to "political, sociological or philosophical" opposition to participation in war or combatant service.[1] Therefore, while the registrant may be entitled to line out questions 1 and 2, he invites perhaps needless controversy by doing so.

If the registrant cannot conscientiously answer question 1 with a simple "yes" or "no", he can answer "yes" and note that he explains his answer on a separate sheet, or simply state that his answer is given on a separate sheet, or that the answer "depends on the definition"[2] and is given in full on a separate sheet. A "yes" answer will probably make the best impression on the local board, and the registrant should carefully consider the expanded contemporary definition of "Supreme Being," ¶ 1036 *supra*, to see if he can honestly say his belief is within the definition in *Seeger*. If the registrant decides not to answer questions 1 and 2, he should carefully note the omission of the Supreme Being requirement from the 1967 Act.

1. Particularly is this so if one takes the expansive view of "Supreme Being" evinced by the Court's opinion in *Seeger*. For example, if one adopted the view of Dr. David Saville Nuzzey, a leader in the Ethical Culture Movement, he would believe in a Supreme Being even if his belief were confined to "devotion . . . to the highest ideal that [man] can achieve." 380 U.S. at 182-83. Belief in a Supreme Being may be evidentiary of religious training and belief in the sense that if one does believe in a Supreme Being, it is more probable than it would be in the absense of such belief that his convictions are "religious." This "more probable than otherwise" formula is the federal court test for relevance in the admission of evidence. McCormick, Evidence § 152, at 318 (1954). The converse proposition, that evidence of each of belief in an orthodox Supreme Being is evidence that one's convictions are not religious, is expressly disapproved in *Seeger*.

2. This was the answer given by Forest Britt Peter, whose case was decided as a companion to *Seeger*. 380 U.S. at 169.

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Question 3 asks the source of the registrant's belief. The answer may include lists of persons, books, other writings and events. Quotations from biblical, theological, or philosophical works are very much in order at this point. There is, of course, a preference for orthodox works on religion. The registrant should not, however, hesitate to cite authors and works of a character not customarily considered religious, if these works have influenced him. Only if "non-religious" works are the sole basis of the registrant's claim is there reason for question.[3] The important thing is to convince the board of the registrant's sincerity, and of the depth of his conviction, and some ascribable basis for his belief is obviously the easiest way. It is not, however, the only way. Even the Director of Selective Service has conceded the possibility that a sudden insight may have the same impact as years of careful schooling.[4]

If the registrant is or has been a member of a church which does not have opposition to participation in war as an article of faith, he should describe his movement away from the standard position of his church. For example, if a registrant has been a Catholic, and has come to reject the "just war" thesis, he should describe the evolution of his belief, citing (if he can) such things as the writings of pacifist or antiwar thinkers in the Church, or admonitions concerning the possibility of nuclear war from church leaders. This recital is intended to be suggestive, not exhaustive, and indicates the careful thought which must be given to the question on the sources of belief. If the claim of objection is raised after 18 and was not mentioned on the registrant's Form 100, it may be well to describe the course of development of the registrant's belief and to point out that it only recently matured, to overcome any adverse inference from his failure to claim CO status at age 18.

Question 4 asks upon whom the registrant relies for religious guidance. Reliance upon another is not an index of sincerity of lack of it, but the listing of a religious advisor—in the broadest sense—can be important support for the registrant's claim.

Question 5 asks under what circumstances the registrant believes in the use of force. "Force" is a misleading term, and the registrant would do well carefully to define it for his own purposes before embarking upon his answer. Force is not the equivalent of "violence." Even a belief in violent conduct does not disqualify one from CO status. See ¶ 1039 *supra*.

Question 6 asks for a description of conduct evincing consistency and depth of religious conviction. An answer may appropriately deal with the reasons for raising a claim after the age of 18, if that is the case, including lack of awareness of the meaning of conscientious objection, misconceptions concerning the classification process, or other reasons. The registrant should discuss events in his life and attitudes he has consistently displayed which are in accord with his claim of exemption. For example, if he has worked as a counselor, social worker, church assistant, or in any other capacity bespeaking nonviolent approaches to social problems, this experience should be listed.

Question 7 asks for details of public expression of views underlying the CO claim. Such public expression may include ministerial or missionary work, participation in demonstrations, speeches, discussions, or even personal correspondence or conversations with friends. Because the Justice Department investigation procedure is no longer available to a registrant claiming CO status,[5] it is well to note the names of persons to whom he has made such statements, and to include statements by them which corroborate the registrant's statements. Copies of newspaper clippings, church program announcements, and other memorabilia may be appropriately included.

3. Fleming v. United States, 344 F.2d 912 (CA10 1965).

4. CCCO, Handbook for Conscientious Objectors, 86 (9th ed. 1967), quoting letter to the Justice Department from General Hershey, written March 5, 1942.

5. For a description of the procedure, see ¶ 1034 n.1.

¶ 1044. Conscientious Objection — Form 150 — Series III (General Background)

The questions as to schooling, employment and residence are perhaps now suprefluous, given the elimination of the Justice Department investigation. See ¶ 1034 n.1. There will be no checking by the FBI of these matters, no discussions with former neighbors and teachers. The registrant must submit such information on his own. See ¶ 1046 *infra*. However, if a military school or defense plant is listed the registrant should explain his attendance or employment. Uncompensated social service employment should be listed.

Question 5 asks the religious affiliation of the registrant's father and mother. While one's parents' affiliations cannot disqualify one from CO status, parental activity expressing opposition to participation in war should here be described, using separate sheets if necessary. The definition of "religion" for these purposes should be as broad as that which the registrant would have applied to himself.

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¶ 1045. Conscientious Objection –– Form 150 –– Series IV (Participation in Organizations)

Question 1 asks of membership in a military organization, and the reason for such membership. Membership in ROTC programs, or perhaps in foreign military organizations (for aliens) will probably create the most frequent problems under this heading. The registrant with such a history would be advised to discuss the reasons for his participation in the military, the reasons for his terminating it and the time of its termination. It may even be that membership in a military organization has brought a registrant's views into focus or enabled him to better understand the meaning of "participation in war", and if so he should so state.

Question 2, and its subquestions inquire about affiliation with a formal religious body. Again, the absense of any provision for a Justice Department hearing, and the desuetude into which the local board subpena power has apparently fallen, counsel that the registrant should include verification in the form of letters and statements for his assertion that he belongs to or attends a church. The last subquestion under question 2 asks the sect or church's position on participation in war. The registrant may be able to obtain this information from his pastor, or he may consult other publications.[1] Some denominations maintain registers of their members who have attained CO status.

1. National Service Board for Religious Objectors, Statements of Religious Bodies on the Conscientious Objector, available from NSBRO, Washington Building, 15th & New York Ave., N.W., Washington, D.C., 45¢.

¶ 1046. Conscientious Objection –– Form 150 –– Series V –– References

While the giving of names of persons who can testify as to the registrant's opposition to participation in war is helpful, the registrant should also obtain statements from these persons or ask them to write him letters to pass along to his local board. Persons who disagree with the registrant's views but respect his position are preferable as references. The registrant or his attorney or counselor should carefully explain to each of the prospective references the purposes of their writing to the board. If the prospective writer is receptive, he should have described to him the requirements of the law, along with a general description of the registrant's position. Each letter need not support all elements of a registrant's position. Rather, some letters may testify to the registrant's opposition to war, others to the strength of his character and to his honesty and sincerity, still others to events in his life which lend credence to his claim. The provision of materials such as this is of the greatest importance in the absence of other investigative facilities. Each letter may appropriately begin with a statement that the writer is sending the letter in support of the registrant's claim for conscientious objection. Knowledge that one is writing in support of a given exemption or deferment, perhaps also coupled with knowledge of the false statement prohibitions in the Act, makes falsity in the letter a felony under § 12(a). Thus, the letters take on the quality of affidavits, and good tactics may dictate mention of this fact to the board at an opportune time. Alternatively, the registrant may wish to convert some letters to affidavits, by use of a notary, to put them on the same level with the sworn testimony taken in personal appearances.

¶ 1047. Conscientious Objection –– Form 150 –– Registrant's Certificate

The registrant must certify the truthfulness and completeness of the answers on the form; his attention is directed by the form to the false statement provision of § 12 of the Act.

The form also requires one assisting the registrant in preparing Form 150 to sign a statement to that effect, and this requirement is ostensibly as binding as a formal regulation. R1606.51(a).[1] Who has "assisted" within the meaning of the form? The space given for stating the reason for providing assistance contains the notation "For example – registrant unable to read and write English, etc.", and assistance is arguably limited to aid of that or similar kinds, so that a lawyer or draft counselor would not be required to sign the form. Practitioners who have signed Forms 150 as having assisted the registrant have often met local board hostility to their clients upon the ground that the assistant must have put words into the registrant's mouth or written his answers for him. Given this difficulty, the practitioner is warranted in not signing if the answers are the registrant's and the registrant's own words, although the lawyer has advised the registrant on his rights and on the relation of the questions on the form to the requirements of the Act and regulations.

1. R1606.51(a) merely states that all forms are made part of the regulations. However, the forms are not published in the Federal Register. This omission should rob directives embodied in the forms of all effect except against one having actual notice. See ¶ 31 *supra.*

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¶ 1048. Conscientious Objection — Form 151 — Volunteer for Civilian Work

At the time he files his Form 150, a registrant claiming a I-O classification may wish also to volunteer for civilian work. He does this by filing Form 151, which states that he waives all right to personal appearance and appeal in the event he is classified I-O and will perform civilian work at any time convenient to the government. The effect of filing Form 151 is to make him immediately eligible for civilian work as set out in ¶ *infra*. A registrant who does not file Form 151 and who is classified I-O will be placed in the order of call and cannot be called for civilian work any sooner than he would have been ordered to report for induction had he remained I-A. R1660.20. Filing Form 151 does not waive the registrant's right to a choice of civilian work. R1660.20.

The filing of Form 151 is often accomplished as a token of the registrant's sincerity. Where the registrant is I-A and his induction appears imminent, he may wish to file Form 151 to show that his CO claim is not based upon a desire to evade service. Moreover, R1660.10 provides that the board "shall promptly classify any . . . volunteer who claims eligibility for Class I-O," thus mandating a reopening of the registrant's classification. Arguably, this provision may be taken advantage of even after issuance of an order to report for induction.

¶ 1048.1 Conscientious Objection –– Raising Claim After Order to Report for Induction

R1625.2 precludes reopening of a registrant's classification after mailing of the order to report for induction, See ¶ *infra* on the reopening process, "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." Although there is some contrary authority,[1] courts have held that a change of belief which results in a registrant becoming a conscientious objector can be a circumstance over which he has no control.[2] These cases say that if a registrant's CO claim matures prior to the mailing of an order to report for induction, he must present that claim to his local board at the time he becomes aware of it.[3] This is a consequence of the general requirement that the registrant report all changes in his status which may affect his classification.[4] However, if the claim matures after the notice is mailed, the registrant may raise it by filing a Form 150 or merely by making a claim that he is a conscientious objector and asking that he be given a Form 150 to fill out.[5] If his Form 150 states a prima facie case for exemption as a conscientious objector,[6] the board must reopen his classification with all attendant procedural rights of personal appearance and appeal.[7] Reopening requires cancellation of the induction order issued the registrant. CO claims by those in the military are discussed in Part V of this Manual; and in cases reported in the *Recent Decisions* section.

There has been considerable criticism of the rule that the post-induction order claim is not available to a registrant who held conscientious objector beliefs prior to the mailing of the order.[8] First, it is said and justly so that many registrants are unaware of their right to claim conscientious objector status, an ignorance which the Classification Questionnaire (SSS Form 100) which the registrant fills out at 18 does little to allay. The form merely tells the registrant to sign Series VIII if he claims to be a "conscientious objector," without explaining that this is the means he should use to say that he cannot, by reason of religious training and belief, engage in killing or belong to the military.[9] Second, it is argued that the statute mandatorily pro-

1. *E.g.*, United States v. Schoebel, 201 F.2d 31, 33 (CA7 1953); Davis v. United States, 374 F.2d 1 (CA5 1967). The discussion in this paragraph relies upon Neisser, Conscientious Objector Claims After the Order to Report for Induction, unpublished article, Yale Draft Law Seminar, on file in Yale Law Library and at SSLR (April 1968).

2. United States v. Gearey, 368 F.2d 144 (CA2 1966), is now the leading case. The subsequent procedural history is contained in the affirmance on remand, 266 F. Supp. 161 (S.D.N.Y. 1967) *aff'd.* 379 F.2d 915 (CA2 1967), *cert. denied,* 389 U.S. 959 (1967). See *See also* United States v. Stafford, 389 F.2d 215 (CA2 1968), 1 SSLR 3040; United States v. Baker, 1 SSLR 3017 (E.D.N.Y. 1968).

3. United States v. Gearey, *supra.*

4. R1625.1(b), implementing Act §15(b).

5. The board is required to give him a Form 150 if he requests it, R1621.11 (board "shall furnish" Form 150). Boswell v. United States, 390 F.2d 181, 1 SSLR 3057 (CA9 1968) (failure of board to give registrant a Form 150 and permit him to file it is arbitrary, capricious and a denial of due process, even though registrant first requested the form after he received an order to report for induction). In United States v. Stafford, 389 F.2d 215, 1 SSLR 3040 (1968), the registrant took a letter claiming CO status with him to his local board on the day set for his induction, and when he was unable to deliver the letter because the board was closed, took the letter to the induction station and gave it to the processing officer there. The court held that the registrant was nonetheless entitled to the opportunity to file a Form 150 and to have it considered on the merits by the local board to determine whether his claim matured after the mailing of the order to report for induction.

6. See United States v. Freeman, 388 F.2d 246, 1 SSLR 3012 (CA7 1967); Miller v. United States, 388 F.2d 973, 1 SSLR 3014 (CA9 1967) (suggesting that only if the Form 150 is "frivolous, wholly unsubstantial and unworthy of any consideration" may the board refuse reopening); United States v. Federspiel, 1 SSLR 3042 (N.D. Ohio 1968).

7. Miller v. United States, *supra* note 6. In United States v. Federspiel, *supra* note 6, the court held that a prima facie valid CO claim first raised orally upon refusal of induction and later by filing a legally sufficient Form 150 required the board to reopen and give the registrant a personal appearance.

8. *E.g.*, United States v. Crawford, 119 F. Supp. 729 (N.D. Calif. 1954); Note, Pre-induction Availability of the Right to Claim Conscientious Objector Exemption, 72 Yale L.J. 1459 (1963).

9. See authorities cited Note 8 *supra.* In *In re* Arrece Webb, SSS No. 22 59 46 44 (October 14, 1967), an unreported opinion of a Justice Department hearing officer, the hearing officer specifically found: "Registrant's failure to claim exemption on the basis of religious beliefs at the time he completed his questionnaire may be attributed to a lack of full knowledge of or appreciation of his rights." In Webb, the claim was first raised after refusal of induction. *See also Federspiel, supra* note 6.

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vides that "Nothing contained in this title shall be construed to require" service by conscientious objectors. This mandatory statutory provision, it is argued, cannot be defeated by a procedural timeliness regulation, at least absent a voluntary waiver by a registrant of conscientious objector rights which he knows exist.[10] These arguments have not found much judicial favor,[11] but authority from which to argue by analogy is plentiful.[12]

In sum, therefore, a registrant who receives an order to report for induction and wishes to claim conscientious objector status should promptly contact his local board and in writing claim the exemption and ask for a Form 150. The Form should then be filled out, giving attention to the preceding paragraphs.

10. *Contra,* United States v. Gearey, *supra* note 2. However, the mandatory language of §6(j) was relied upon in *Quaid v. United States,* 386 F.2d 25 (CA10 1967) in holding invalid a regulation providing for mandatory induction of delinquent reservists. The court said that the statute's command had to be observed by giving every registrant, before induction, the opportunity to make his claim for conscientious objector exemption.

A presumption that an important right is lost by failure to assert it seems particularly unfortunate in this field. *See* Neisser, *supra* note 1. The right to take an appeal in a criminal case, which if not asserted seasonably is usually held irredeemably lost, has been held not to have been voluntarily waived by one who was not shown to have made a considered choice to forego it. Fay v. Noia, 372 U.S. 391, 439 (1963). The Supreme Court has emphasized time and again that a constitutional right may not be foregone without a deliberate choice – an intentional relinquishment of a known right. *Id.* Of course, the conscientious objection exemption is statutory in the first instance, although the free exercise clause may compel Congress to recognize it. Clancy & Weiss, *The Conscientious Objector Exemption: Problems in Conceptual Clarity and Constitutional Considerations,* 17 Maine L. Rev. 143 (1965).

11. *E.g.,* United States v. Gearey, *supra* note 2.

12. See authority is cited in note 10.

¶1049. Class I-C –– Military Personnel

R1622.12 provides for placement in Class I-C members of the armed forces, inductees after induction, service academy cadets, regular officers of the Public Health Service and the Environmental Science Services Administration, and reserve officers of the PHS on active duty and assigned to one of the offices and bureaus of the PHS or to the Coast Guard, Bureau of Prisons or the Environmental Science Services Administration. Persons in these classes are exempt from registration, but if they register, they are placed in Class I-C. See ¶1007 *supra;* Act, §6(a)(1). See LBM 1.

¶1049.1. Class I-D –– Reservists, National Guardsmen, Students Taking Military Training

To be placed in Class I-D are those who enroll in upper division ROTC programs at their schools, who agree to accept a commission in the armed forces at some later date and accept certain other active duty and reserve obligations, R1633.13(b); certain military college students; those who enlist in the reserves or the National Guard; those enrolled in approved military colleges; those who have agreed to enlist, and have been accepted, as aviation cadets (but not more than four months after the signing of the agreement); and those in reserve units who are "serving satisfactorily." R1622.13, which provides for reservist and prospective enlistee I-D deferments and exemptions (LBM 38), virtually reproduces the language of §§6(c) and 6(d) of the Act.

¶1050. Class I-S –– High School and (Some) College Students

Full-time high school students are to be retained in Class I-S(H) until they graduate, reach the age of 20, or cease full-time attendance, whichever first occurs. R1622.15(a); Act §6(i). Graduate and undergraduate college students who receive orders to report for induction while attending school full-time may obtain deferment in Class I-S(C) until the close of the academic year or until they drop out, whichever first occurs, unless they have on a previous occasion been given a I-S classification for the same reason, or have requested and received a II-S deferment since July 1, 1967, and have received the baccalaureate.[1] Claims for placement in Class I-S(C) may be substantiated by asking the school or college to send SSS Form 109 (undergraduates) or SSS Form 103 (graduates) verifying the student's full time attendance. All I-S de-

1. The question whether *all* recipients of II-S deferments since July 1, 1967, who have received the baccalaureate are disqualified from receiving a I-S(C), or whether only those who have received an *undergraduate* II-S are so disqualified, has been the subject of considerable controversy. The argument for a I-S(C) in these circumstances is set forth in Griffiths & Heckman, *Eligibility for I-S of Registrants Holding Graduate II-S Since July 1, 1967,* 1 SSLR 4041 (1968). Litigation over this question is pending at this writing. Results of some such litigation is reported at 1 SSLR 3323. Other discussion of the I-S(C) for graduate students appears at 1 SSLR 17-18 (1968).

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109 (undergraduates) or SSS Form 103 (graduates) verifying the student's full-time attendance. All I-S deferments are provided for by statute, Act §6(i), and R1622.15 substantially follows the statutory wording.

¶ 1051. Class I-W — CO Performing Civilian Alternative Service

A I-O who enters upon civilian work is classified in Class I-W, and upon his release from such work after completion the notation "Rel." is added to the symbol. After he reaches the age at which he is no longer liable for service, he is reclassified V-A. R1622.16. See ¶ 1129 *et seq.* on obtaining civilian work.

¶ 1052. Class I-Y — Not Eligible for Lower Class, but Would be Qualified in Time of War or National Emergency

Class I-Y is the almost infinitely expansible classification often, mistakenly, regarded as a leftover by boards and registrants alike. In Class I-Y is placed a registrant who (1) would be placed in I-A, I-A-O, or I-O, (2) is found not "currently qualified" under applicable physical, mental and moral standards, and (3) who would be qualified in time of war or national emergency declared by Congress. R1622.17. Placement in Class I-Y is, therefore, a denial of any lower classification which the registrant might have claimed, such as IV-F, II-A, or II-S. See the listing of classifications in ¶ 1016 *supra*. The registrant who did claim a lower classification and who receives a I-Y has the right to take an appeal. See ¶¶ 1108-19.1 *infra.*

¶ 1053. Class II — Generally

All Class II classifications are deferments, and subject the registrant to extended liability to age 35. The general policy of deferments, R1622.20(a), is that they are to be granted with an eye to permitting civilian activity important to the "national health, safety and interest" to function without interference with the Selective Service Act, if that is possible. Deferments are granted for a period of one year or less, and a classification may be reopened during the deferment period if there is a change in the registrant's status. R1622.21(a). When the deferment expires, the classification is reopened, ¶ 1095 *infra*; R1622.21(b), and the registrant thereby obtains the right to appeal from an unfavorable reclassification decision.

¶ 1054. Class II-A — Civilian Occupation — Critical Skills and Preparing for Critical Skills

R1622.22(a) reads: "In Class II-A shall be placed any registrant whose employment in industry, or other occupation or employment, or whose continued service in an office (other than an office described in section 1622.41) . . . or whose activity in research, or medical, scientific, or other endeavors is found to be necessary to the maintenance of the national health, safety, or interest." The necessary employment or critical skill deferment is granted in the discretion of the board, with the guidance of a list of occupations designated by the Director upon the advice of the National Security Council, see ¶ 43 *supra*; R1622.23(c). Prior to 1967, the occupations and activities used as a suggested basis for II-A deferment were set forth in lists of currently essential activities and currently critical occupations put out by the Departments of Commerce and Labor respectively. These lists are set forth in the 1967 House hearings on Selective Service.[1] As a result of the 1967 amendment, however, the National Security Council met to consider the question of II-A deferments. Its report was summarized in a telegram to state directors from the National Director on February 16, 1968:

> Under advice received today from the National Security Council with respect to occupational deferments, the lists of essential activities and critical occupations are suspended, leaving each local board with discretion to grant, in individual cases, occupational deferments based on a showing of essential community need. With respect to graduate school deferments, the National Security Council advises that it is not essential for the maintenance of the national health, safety, and interest to provide student deferments for graduate study in fields other than medicine, dentistry, and allied medical specialties; except that this recommendation does not affect existing regulations governing deferment for graduate students who entered their second or subsequent year of graduate study in the fall of 1967. It does

1. Hearings Before the House Comm. on Armed Services, 90th Cong., 1st Sess., at 2071-74 (1967). The lists should also be available from the Departments concerned. When they were in use, information concerning them was available from Executive Secretary, Interagency Advisory Comm. on Essential Activities and Critical Occupations, Bureau of Employment Security, Department of Labor, Washington 25, D.C. See also LBM 33, LBM 79, LBM 95 and Ops. Bull. 303, dealing with critical occupations.

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in Class IV-C. If the registrant returns to the United States, his classification must be reopened and he must be classified anew. If he does return, he must notify the board of his new address. If he is then classified I-A, he has all rights of personal appearance and appeal discussed in ¶¶1079-94 *infra*. If he thereafter departs from the United States, he must again be placed in Class IV-C. It should be noted that the Justice Department does not entirely agree with this analysis.

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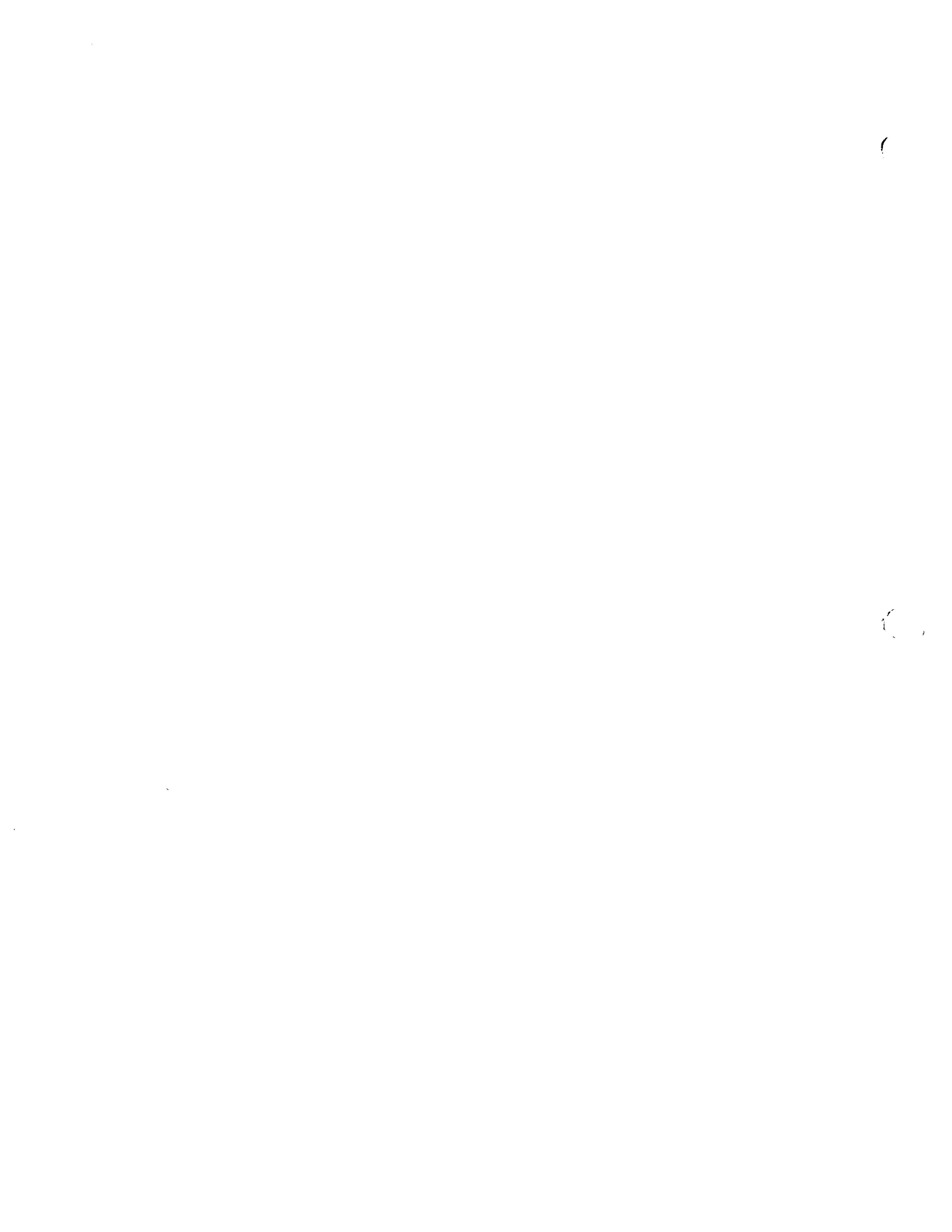

¶ 1065. Class IV-D (Ministers and Divinity Students) — Ministers Generally

Class IV-D, exempting ministers and divinity students, has been productive of a great quantity of litigation, most of it centering on the definition of "minister". The Act, §6(g), provides that "regular" and "duly-ordained" ministers of religion "shall" be exempt, establishing a right to exemption for those who bring themselves within these terms.[1] The terms are defined in § 16 of the Act. A "duly-ordained" minister is one who has been through the ordination or similar ritual of a church or sect "and who as his customary vocation preaches and teaches the principles" of the church or sect. § 16(g)(1). A "regular" minister of religion is one who, without being ordained, makes it his customary vocation to preach and teach the principles of a sect and who is recognized by the sect as being a minister. § 16(g)(2). § 16(g)(3) excepts from the definition "regular or duly-ordained minister of religion" one who only irregularly or incidentally preaches or who does not make it his customary vocation to preach. In the miasma of these provisions is immanent a definition by reference to an "organization established on the basis of a community of faith and belief, doctrines and practices of a religious character," which does little more than restate the question.[2] Each of the elements of the ministerial role, as set out in the Act, is taken up below.

1. See Pate v. United States, 243 F.2d 99 (CA5 1957).
2. The most valuable resource in this field is Weiss, *Privilege, Posture and "Protection": Religion In The Law*, 73 Yale L. J. 593 (1964).

¶ 1066. Class IV-D — "Regular" or "Duly Ordained" Minister

A regular or duly ordained minister is one who stands in relation to a body of believers, converts, or potential converts in the same or similar relation to their denomination as does a regular or duly ordained minister of older and better known denominations.[1] The Supreme Court has identified "teaching and preaching the principles of his sect and conducting public worship in the tradition of his religion" as the "vital test" of a IV-D claim,[2] and the legislative history evinces an intention to exempt "the leaders of the various religious faiths and not the members generally."[3] Difficulty sometimes arises when the ministerial activity in question is out of the ordinary mold, at times because there is more than one person who may legitimately be termed spiritual leader of a given congregation.[4] Among the heterodox patterns of religious activity embraced within the definition, is preaching from door-to-door and on street corners,[5] or otherwise without a pulpit.[6] There is, however, language which suggests that the relationship of shepherd to flock is that designed to be protected by the Act.[7] It seems clear, nonetheless, that the statutory dual standard—"duly ordained and "regular"—is designed to provide an exemption for those whose ministerial activity is not carried on in the ordinary way, and the Supreme Court has held that the Act does not purport to impose a test of orthodoxy of belief or method of preaching in granting the ministerial exemption.[8] Nor may the local board disqualify an applicant for IV-D status upon the ground that his education in preparation for ministerial duties is insufficient, or that he has not attended a theological seminary or divinity school.[9]

1. Rase v. United States, 129 F.2d 204, 209 (CA6 1942); Wood v. United States, 373 F.2d 894, 899 (CA5 1967), citing Fitts v. United States, 334 F.2d 416, 421 (CA5 1964). *See* Dickinson v. United States, 346 U.S. 389, 394-95 (1953).
2. Dickinson v. United States, 346 U.S. 389, 395 (1953).
3. S. Rep. No. 1268, 80th Cong., 2d Sess., at 13 (1948).
4. Application of Kanas, 385 F.2d 506 (2d Cir. 1967) is an example. Kanas was a cantor denied IV-D exemption, whom the court released on habeas corpus, as there was no evidence to contradict his and the congregation's assertion that he taught and preached and was important to congregational worship. See also United States v. Burnett, 115 F. Supp. 141, 145-46 (E.D.Mo. 1953), holding inability to perform marriages irrelevant, a question left open in *Kanas* as unnecessary to the decision since Kanas stated he did officiate at marriages. 385 F.2d at 510 n.5. *See also* United States v. Jones, 142 F. Supp. 806, 819 (E.D.S.C. 1956), *aff'd*, 241 F.2d 704 (CA4 1957) in which the court held that a photostatic copy of a minister's license to solemnize marriages was not enough evidence to require reopening of a registrant's classification.
5. United States v. Cheeks, 159 F. Supp. 328 (D. Md. 1958) (Jehovah's Witness),
6. Pate v. United States, 243 F.2d 99, 103 (CA5 1957).
7. Fitts v. United States, 334 F.2d 416, 421 (CA5 1964). But see cases cited note 9 *infra*, dealing with prejudice against a sect with many ministers.
8. Dickinson v. United States, 346 U.S. 389 (1953).
9. Niznik v. United States, 184 F.2d 972 (CA6 1950) (example of local board prejudice against Jehovah's Witness ministerial exemption applicant); Pate v. United States, *supra* note 6; United States v. Stepler, 258 F.2d 310 (CA3 1958) (Jehovah's Witness); United States v. Kezmes, 125 F. Supp. 300 (W.D. Pa. 1954); United States v. Fiedler, 136 F. Supp. 745 (E.D. Mich 1954).

¶ 1067. Class IV-D — Definition of "Church, Sect or Organization."

Beyond the statutory definition, ¶ 1065 *supra*, the decisional law sheds little light. See discussion of "religious training and belief," ¶¶1036-38 *supra*. The requirement of a "community of faith" must be loosely defined, given the clear teaching of the cases that itinerant proselytizers without pulpit may be eligible for

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the exemption. ¶ 1066 nn.5-6 *supra*. As the Court said in *Cantwell v. Connecticut*, the first amendment "forestalls compulsion by law of the acceptance of any creed or *the practice of any form of worship*."[1] In setting up an exemption for ministers, the law comes so very close to creating an establishment of religion that the broadest possible reading of the term "church, sect or organization" is necessary lest a succession of constitutional doubts be created.[2] In *Watson v. Jones*, the Court said, "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."[3] A requirement that in order to qualify for the exemption a minister must show that those to whom he ministers form a cohesive group in the style of well-established religions comes very close to a judgment that some forms of worship more nearly express the truth about man and God than others. And that of course is a decision forbidden by the first amendment:

> "In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight . . . The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's 'Supreme Being' or the truth of his concepts. But these are inquiries foreclosed to Government. As Mr. Justice Douglas stated in *United States v. Ballard*, 322 U.S. 78, 86 (1944): 'Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others.' "[4]

Here as in the field of conscientious objection, the law must seek a secular definition of religion lest it make judgments about any particular creed which the establishment clause forbids it to make. The problem is thus quite like that presented in *Seeger*, and for the same reason that the Court sought a broad reading of "religious training" in *Seeger*, an applicant for ministerial exemption should press for a broad reading of "church, sect or organization."

1. 310 U.S. 296, 303 (1940).
2. *See* Comment, 56 Calif. L. Rev. 100 (1968); United States v. Ballard, 322 U.S. 78 (1944).
3. 80 U.S. (13 Wall.) 679, 728 (1871).
4. United States v. Seeger, 380 U.S. 163, 184-85 (1965).

¶ 1068. Class IV-D — "Customary Vocation"

Beyond the statutory definition of minister, ¶ 1065 *supra*, there are few objective guidelines for determining whether a registrant pursues his ministerial calling as a "vocation". If he pursues the calling half-time, part-time, occassionally or irregularly, then he is not, in general, entitled to the ministerial exemption.[1] It has been suggested that one who devotes more than half of his time to religious duties, so that his secular duties are somewhat less than his ministerial duties, would be qualified.[2] Generally, however, the test is not so mechanically applied, and courts look at the qualitative rather than the quantitative role of ministerial activity in the life of the registrant.[3] Decisions in some number have upheld denial of ministerial classifications to those whose secular activity or employment required more hours per week than their ministerial activity,[4] although this is not a firm rule. Other courts have recognized that it may be necessary for one truly committed to the ministry to work long hours to support himself and his ministry, and have held registrants entitled to the ministerial exemption where that was the case.[5] A poor congregation is, after all, as much entitled to a minister as a wealthy one. In order to claim the ministerial exemption under such circumstances, however, it should be clear that the ministry is the registrant's chief endeavor and that he regards his secular occupation only as a sideline or means of sustenance.

In addition to the secular occupation-religious occupation dichotomy, courts have generally required that the registrant spend a certain minimum number of hours in ministerial activity each month. One court has suggested 160 hours – four forty-hour weeks – as a guideline,[6] but this sentiment is by no means universal and a lesser number of hours may well suffice if the ministerial activity is clearly the registrant's chief

1. Dickinson v. United States, 346 U.S. 389 (1953).
2. United States v. Kahl, 141 F. Supp. 161 (E.D. Mich. 1956). *Accord*, United States v. Lebherz, 129 F. Supp. 444 (D.N.J. 1955). *But see* Pate v. United States 243 F.2d 99 (CA5 1957).
3. A registrant need not derive his income from his ministry. Dickinson v. United States, 346 U.S. 389 (1953); Hacker v. United States, 215 F.2d 575 (CA9 1954); United States v. Stewart, 322 F.2d 592 (CA4 1963) (dictum); Muhammad Ali v. Connally, 266 F. Supp. 345 (S.D. Tex 1967).
4. Denial of IV-D upheld where registrant had secular occupation which required more time than ministerial duties: United States v. Kushmer, 365 F.2d 153 (CA7 1966), *cert. denied*, 387 U.S. 914 (1967) (30 hours per week employment; 80 hours per month ministerial activity); Badger v. United States, 322 F.2d 902 (CA9 1963), *cert. denied*, 376 U.S. 914 (1964) (40 hours per week as salesman, 30-35 hours per week ministerial activity). *Cf.* United States v. Rossi, 143 F. Supp. 878 (E.D. Mich. 1956).
5. Wiggins v. United States, 261 F.2d 113 (CA5), *cert. denied*, 359 U.S. 942 (1959). In *Wiggins*, the court said that a 40 hour per week crane operator who could only spend 40 hours per month on religious activity, but who regarded his ministry as his chief purpose in life was entitled to the exemption. *Wiggins* is an important, thoughtful case which deserves careful study. The *Wiggins* case was followed in United States v. Garcia, 1 SSLR 3016 (C.D. Calif. 1968).
6. United States v. Kenstler, 250 F. Supp. 833 (E.D. Pa. 1966), *aff'd*, 377 F.2d 559 (1967).

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work and true vocation.[7]

The test for ministerial exemption is objective, and the local board is not free to reject the registrant's claims of entitlement without solid evidence,[8] nor to reject the registrant's application on the ground that it feels his entry into the ministry was for "unworthy" motives rather than sincere belief.[9]

7. A rule of thumb "minimum" figure for ministerial activity entitling one to a IV-D is 100 hours per month. *E.g.*, The New Selective Service Law: A Manual for Lawyers and Counselors 31 (Ginger ed. 1967); Pate v. United States, 243 F.2d 99 (CA5 1967) (pioneer minister). The National Headquarters will generally assist a Jehovah's Witness "pioneer minister" (who must work 100 hours per month) to obtain a IV-D classification. There are, however, some decisions expressly declining to regard 100 hours per month ministerial activity as sufficient, at least on review of a local board finding to the contrary. *E.g.*, United States v. Brown, 382 F.2d 52 (CA3 1967). However, other courts have suggested that 100 hours per month might be enough, particularly for a Jehovah's Witness applicant who is entitled to "pioneer minister" status if he spends 100 hours per month in ministerial activity. See *Wiggins v. United States*, note 5 *supra*. *Cf.* United States v. Jones, 382 F.2d 255 (CA4 1967).

8. Dickinson v. United States, 346 U.S. 389, 396 (1953). However, the registrant must first present evidence making out a prima facie case of entitlement to the exemption. *Id.* at 395. *See Wiggins*, note 5 *supra*.

9. "It is not for the board to judge whether the registrant was motivated by sincere religious principles in becoming a minister...." Witmer v. United States, 348 U.S. 375, 381 (1955) (dictum); United States v. Majher, 250 F. Supp. 106, 112 (S.D. W.Va. 1966). *Accord*, Rowell v. United States, 223 F.2d 863 (CA5 1955). The argument is supported by cases holding that the grant of the exemption is "mandatory" once the statutory definitions are met. *E.g.*, United States v. Hurt, 244 F.2d 46 (CA3 1957); *Pate v. United States*, note 7 *supra*. And of course boards are not free to regard ministerial exemption claims by Jehovah's Witnesses with suspecion or to reject them out of hand as fraudulent merely because all members of the sect claim to be ministers. Dickinson v. United States, 346 U.S. 389, 394 (1953); Olvera v. United States, 223 F.2d 880 (CA5 1955).

¶ 1069. Class IV-D — Divinity Students

To be placed in IV-D a student preparing for the ministry must be pursuing a fulltime course of instruction in a "recognized" theological or divinity school, or be preenrolled in such a school and pursuing a fulltime course of instruction in a religious or secular institution leading to his matriculation. His preparation for the ministry must in either event be under the direction of a "recognized" church or religious institution. Act §6(g); R1622.43. Definitional and, indeed, constitutional problems similar to those discussed in the paragraphs above obviously arise.[1] LBM 56 discusses in detail the classification of divinity students, and provides for a great deal of local board discretion. The lists of recognized theological schools, issued for use under the 1940 Act, are now obsolete and the registrant would do well to insure that the board is not using them. If it is, its attention should be drawn to paragraph 2 of LBM 56. To obtain classification as IV-D, the divinity student must first obtain for submission to the board, information from his church or religious body verifying its sponsorship of him and of his preparation for the ministry. (Definition of "church or religious body" is for the local board, but see ¶1067 *supra*.)

Second, the registrant must demonstrate that the school he attends or in which he is preenrolled is a theological or divinity school within the intent of the Act. This demonstration can be made by showing that the sponsoring religious order accepts graduates of the school for service as regular or ordained ministers. LBM 56, paragraph 4. In making its determination concerning the eligibility of registrant's seminary or divinity school, the board may seek the assistance of the State Director, who may in turn ask for help from the State Director for the state in which the school is located. But the State Director's advice to the local board on the status of the school is not binding on the board. LBM 56, paragraph 5.

The registrant should also obtain for filing with the board evidence of his fulltime student status and of his satisfactory pursuit of the curriculum.[2]

1. Here most sharply raised is the constitutional question of establishment of religion, for the Act, § 6(g), limits the divinity student exemption to those preparing for the ministry under the direction of "*recognized* churches or religious organizations." While it is true that the World War I limitation of the conscientious objector exemption to members of "peace churches," was upheld against a claim that it constituted an establishment of religion, ¶ 1035 n.3 *supra*, cases decided more modernly give reason to doubt the continuing vitality of that holding. *E.g.*, Abingdon Township School District v. Schempp, 374 U.S. 203 (1962) (school prayers). The question tendered by the exemption turns on the definition of "recognized" and fidelity to the purposes of the establishment clause may require a broader reading of the term than boards have heretofore been inclined to give. *See* ¶¶1038, 1067, and cases there cited. Also it may be suggested that undue reliance upon the term "recognized" would produce an arbitrary and irrational discrimination between well-established and not well-established churches. ¶1038 n.4, and accompanying text.

2. There is not much in the way of authority. One case holds that one night a week in religious study plus ten hours per week homework does not qualify one for the divinity student exemption, at least in the face of a local board decision not to grant it. United States v. Bartelt, 200 F.2d 385 (CA7 1952).

¶ 1070. Class IV-F — Not Qualified For Any Military Service

Section 4(a) of the Act provides mandatorily that "no person shall be inducted" until his physical and mental fitness is determined. See ¶8 *supra*. The IV-F classification is granted to registrants who are not qualified, under current physical, mental or moral standards, for service in the armed forces. It differs from I-Y

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in that the disqualification extends to all service, in peacetime or in time of war or national emergency declared by the Congress. R1622.44(a). Also to be placed in Class IV-F are those in the medical, dental or allied specialist category who apply for reserve commissions and are rejected solely for physical disqualification. R1622.44(b). The applicable physical, mental and moral standards are prescribed by the Department of Defense. AR 40-501, c.2, reprinted in SSLR, at 2203. The procedure for claiming under the physical and mental standards is set out at ¶¶ 1108-19 *infra*. The question of "moral" fitness is the subject of Army Regulations, particularly AR 601-270, reprinted in SSLR. See ¶ 1118 *infra*.

¶ 1071. Class V-A –– Registrants Over the Age of Liability

Registrants over the age of liability for military service – 26, R1622.50(a), 28 if deferred for service in the National Guard under the provisions of §6(c)(2)(A) which were in effect from 1955 until 1963, R1622.50(b), and 35 if deferred under any other provision of the Act or if in a medical, dental or allied specialist category, R1622.50(c) – are placed in Class V-A. LBM 38 lists those deferments and exemptions which extend liability. Those on active duty in the armed forces are retained in Class I-C regardless of age, and those performing civilian work in the national health, safety and interest are retained in Class I-W regardless of age. R1622.50(c).

¶ 1071.1. Special Classification Problems of Doctors, Dentists and Allied Medical Specialists

Those in medical and paramedical specialties are specially treated in the Selective Service process. For statutory authority, see ¶ 14 *supra*; for induction provisions, see ¶ 1128 *infra*.

The following discussion pulls together some of the special provisions of law relating to the classification of such registrants. First, a medical student is entitled to a II-S deferment to complete his medical studies, R1622.26(a), which of course gives him extended liability under the Act. ¶ 1071 *supra*. Second, one in the doctors, dentists and allied medical specialists category is not eligible for a III-A classification based on fatherhood, although he is eligible for such a deferment based on extreme hardship to dependents. R1622.30; ¶ 1061 *supra*. See also R1622.44(b), concerning placement in Class IV-F of medical personnel who apply for commissions and are found physically disqualified.

Registrants in medical and paramedical categories are specially identified in Selective Service records, LBM 77, and are given physical examinations as soon as possible after receiving their degrees. LBM 81. There are looser provisions concerning their fitness for service than for the general run of registrants.[1]

All registrants in the doctors, dentists and allied specialist category are liable for training and service to age 35. R1622.50

1. Ops. Bulls. which deal with medical specialists include 274 on physical examinations for physicians who are applicants for the Armed Forces residency program (Berry Plan), 279 dealing with physicians appointed to the Public Health Service, 289 dealing with the postponement of induction of dentists, 291 dealing with the reclassification and examination of registered professional male nurses, 293 dealing with the report of availability on summary of classification for physicians, dentists and veterinarians (SSS form 129), and 295 dealing with the processing and commissioning of physicians, veternarians, and allied specialists. All Ops. Bulls. are reprinted in full in SSLR's *Statutes & Regulatory Material* section.

G. Classification Procedure at Local Board Level

¶ 1072. Classification Procedure –– Generally

After the board has before it the information in Form 100, the other materials filed by the registrant, claims and information filed by others seeking deferment of the registrant, and other information obtained by it in its researches, the board classifies the registrant. The registrant is presumed I-A (available for service) unless he produces evidence to the contrary. R1622.10. The procedure is the same ~~as that followed~~ each time the board classifies a registrant; certain procedural forms must be followed, and certain procedural rights respected, lest the board's action be subject to challenge.

The first requirement is that the board classify the registrant at a formal meeting,[1] at which a quorum of members is present.[2] Informal telephone conversations are not enough.[3] Nor is it sufficient that only a

1. "The failure to meet and act as a board violated the implicit requirements of 32 C.F.R. § 1604.52a(d) and therefore of procedural due process." United States v. Walsh, 279 F. Supp. 115, 121 (D. Mass. 1968).

2. R1604.56; R1604.52a(d). Keene v. United States, 266 F.2d 378 (CA10 1959) (dictum); United States v. Walsh, *supra* note 1; *In re* Shapiro, Civ. No. 51-67 (D.N.J. May 15, 1967) (available in facsimile from SSLR – 5 pages). *See* United States *ex rel.* Lawrence v. Commanding Officer, 58 F. Supp. 933, 948 (D. Neb. 1945) (board could divide up workload and let one member conduct preliminary examination, provided that a quorum of the board actually considered registrant's case and voted on his classification).

3. United States v. Walsh, *supra* note 1.

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¶ 1076. Classification Procedure –– Record of Board Action –– Possession of Notice of Classification

Board action concerning classification is noted on the registrant's cover sheet, Form 101, in the local board minutes, Form 112, on the board's classification record, Form 102, on the registrant's classification questionnaire, Form 100, on a notice of classification sent to the registrant, Form 110,[1] and on an advice of classification, Form 111, sent to every person who is on file as having requested a deferment for the registrant. R1623.4(b).[2] In addition, each board maintains a record of conscientious objectors. R1623.8. The notice of classification sent to the registrant will bear a date stamp indicating the date of mailing.[3] The regulations require that the registrant have his currently valid notice of classification in his personal possession at all times, except that he is to surrender it when he is inducted or enters upon active duty in the armed forces. R1623.5. For a discussion of the possession requirement as applied to registration certificates, see ¶ 1013 *supra.*[4] Duplicate notices are issued under R1623.6.

1. Except that no notice of classification is sent a registrant classified I-C (on active duty in armed forces). R1623.4(a).

2. Except that no advice of classification is sent when the registrant is classified V-A. Notice of the date of termination of deferments I-A, II-A, II-C, and II-S is to be entered on the advice of classification. In addition, the board's minutes are to be posted. If any person desiring information about the classification of a registrant is unable to determine his classification from the posted minutes, a board employee must provide the information from other board records. R1623.4(c).

3. The date of mailing of the notice of classification is also recorded on the classification record, SSS Form 102, and the classification questionnaire, SSS Form 100. The date of mailing the classification advices is to be entered on the classification questionnaire as well. R1623.4(e).

4. *See also* United States v. Hertlein, 142 F. Supp. 742 (E.D. Wisc. 1956).

¶ 1077. Classification Procedure –– Disqualification

A local board member may not act on the classification of a registrant related to him by blood or marriage within certain specified degrees, or who is an employee or business associate of his. R1604.55. If this disqualification should leave the board without a majority of its members able to act, the State Director must designate another local board to take action on the case. R1604.55(a). Nor may the board classify its own government appeal agent, associate appeal agent or advisor to registrants. R1604.55(b).

¶ 1078. Classification Procedure –– Transfer for Classification

A registrant may be transferred for classification under two sets of circumstances. First, he may be transferred for initial classification if he is so far from his own board that complying with notices is a hardship. R1623.9(a). The regulations apparently contemplate use of this procedure only at age 18, after initial completion of the Form 100. However, it appears the fairest procedure for a registrant distant from his board at any time.

However, the regulations proivde for transfer to another local board for classification "at any time" only in the event that a majority of the local board members (or of every panel of the board if it sits in panels) recuse themselves for bias, conflicting interests, or any other reason, R1623.9(b), or the State Director orders transfer to promote "equitable administration of the selective service law" or when any single member of the board is disqualified under R1604.52a or 1604.55 (relating to disqualification for bias and interest). R1623.9(c). Given this discretionary power, it would appear that the State Director could at any time order transfer for classification of a registrant residing at a distance from his own board. Reasons for such discretionary transfer would include: distance from the registrant's local board robs him of his right to a personal appearance; a local board in the area where he resides is more qualified to pass upon a claim for, *e.g.*, occupational deferment; and, *demonstrable* bias against the registrant.

In any event, the request for trnasfer of initial classification should accompany the Form 100 when it is returned to the board. Transfers in other circumstances should be requested of the State Director at the same time the registrant seeks reopening of his classification from his local board, and a copy of the request sent to the board.

When a registrant is transferred, the transferee board makes out a duplicate cover sheet, files all information submitted by the registrant or forwarded from the local board of origin, and retains jurisdiction pending classification, personal appearance and appeal, including any request for reopening that may be filed while the transferee board has the file. R1623.10. Upon completion of this process, the file is returned to the board of origin, and the transferee board retains only the duplicate cover sheet. R1623.10(b).

The registrant whose transfer request is denied may wish to request, after his initial classification, a

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"courtesy personal appearance" before the local board nearest his residence. This personal appearance is a matter of local board discretion, and is not provided in the regulations. It is a matter of custom in some parts of the country.

H. Personal Appearance before Local Board

¶ 1079. The Personal Appearance –– Right of Registrant –– First Steps

A registrant has thirty days from the mailing of the notice of classification, except of course for a notice of classification mailed after a personal appearance or appeal, to ask for a personal appearance before the local board.[1] On computation of time, see R1641.6, LBM 72. The period may not be extended. During the thirty days, and during the pendency of the personal appearance, the registrant may not be ordered to report for induction and any induction order issued during this period must be cancelled by the local board. R1624.3. The request must be in writing.[2] Failure to grant the personal appearance, either in form or in substance, after timely written request, invalidates the board's classification action, unless the registrant subsequently receives the classification he desires.[3]

When he receives a notice of classification placing him in a higher classification[4] than he believes he is entitled to, the registrant should take the following steps. First, he should consult the list of classifications to determine which lower classifications he believes himself entitled to. Second, he should write his local board and ask for a personal appearance before the board and (usually) for an appointment with the government appeal agent. He should request that the appointment with the appeal agent be scheduled before the personal appearance, so he can talk over his situation with the agent. Before seeing the government appeal agent, and certainly before the personal appearance, the registrant should examine his file. Given the dual loyalty of government appeal agents under the regulations,[5] a registrant may not want to discuss his situation with the agent because he has no assurance – nor should he accept as binding any assurance written or oral – that his assertions will not be disclosed to prosecutorial agencies.[6] This serious problem underscores the need for every registrant to discuss his case with a lawyer.

In the normal case, however, the appeal agent can advise the registrant of the procedures customarily followed by the local board (although the appeal agent's statements should be checked against information obtained from competent counsel), and perhaps assist the registrant in determining the most effective way to present his factual and legal contentions to the board. The appointment with the appeal agent may also serve to delay the personal appearance by a few days or weeks, which may serve to ensure that the board will really consider the registrant's case anew when he appears.

If the appeal agent appears cooperative and receptive to the registrant's position, or if he concedes (even grudgingly) the registrant's legal position, he should be asked to attend the personal appearance.

1. The thirty days requirement is met if the request is postmarked on the thirtieth day. LBM 72. The registrant may bypass the personal appearance and appeal directly to the appeal board. See R1626.2(c). However, in the vast majority of cases he is ill-advised to do so. First, the personal appearance is a "remedy" which the registrant ought to exhaust in order to ensure against judicial refusal to review his claim of local board impropriety. Woo v. United States, 350 F.2d 992 (CA9 1965). Second, the personal appearance provides a valuable opportunity to present contentions to the local board. Third, the personal appearance is a way to detect board error or prejudice by asking about board rejection of a claim. During the pendency of the personal appearance the registrant is not inductable.

2. R1624.1 requires that the request be written. And despite judicial liberality toward the legally untutored registrant in the general run of cases involving procedural defaults, *e.g.*, United States v. Stafford 389 F.2d 215 (CA2 1968) (claim of CO status to induction center officials rather than local board effective to put board on notice of claim), there are judicial decisions holding that failure to request a personal appearance in writing excuses the board's failure to grant the appearance. *E.g.*, United States v. Borisuk, 206 F.2d 338 (CA3 1953). There is, however, a strong line of authority counselling against waiver of the right to personal appearance, and an ambiguous request for it, or a conditional request for it, will generally be considered sufficient. United States v. Derstine, 129 F. Supp. 117 (E.D.Pa. 1954) (request for "hearing" amounts to request for personal appearance); Talcott v. Reed, 217 F.2d 360, 363 (CA9 1954) (statement "I will be glad to appear in person" did not waive right to personal appearance; waiver to be found only if facts leave no other reasonable conclusion open). LBM 52, paragraph 2(d), provides that the board should, if the registrant appeals and asks a personal appearance, give the personal appearance.

3. Lancaster v. United States, 153 F.2d 718 (CA1 1946) (failure to accord personal appearance renders subsequent order to report for induction invalid, if registrant not given the classification he desires); United States v. Peterson, 53 F. Supp. 760 (N.D. Calif. 1944) (board is without jurisdiction to proceed further if it refuses to honor request for personal appearance); Bejelis v. United States, 206 F.2d 354 (CA6 1953) (board must grant appearance if requested, and denies registrant due process if it does not, and board denied registrant fair hearing when it said appearance was needless as it was going to transfer case to appeal board); Davis v. United States, 199 F.2d 689 (CA6 1952) (hearing must be granted even though registrant has no new information to submit). ***But see*** United States *ex rel.* McCarthy v. Cook, 225 F.2d 71 (CA3 1955), *cert. denied*, 350 U.S. 937 (1956) (denial of personal appearance not prejudicial as board gave registrant desirable classification and was generally fair to him).

4. The order of classifications, highest to lowest, is given at R1623.2, and ¶ 1016 *supra.*

5. ¶ 45 *supra.*

6. *See* letter to all government appeal agents from the National Director, October 26, 1967, set forth in Press Release, Office of Public Information, National Headquarters, Selective Service System, Nov. 17, 1967, asking appeal agents to make known to the local board or the State Director facts showing violations of the Selective Service laws by registrants.

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¶ 1080. Personal Appearance –– Conducting the Personal Appearance

The personal appearance is conducted by the member or members of the board designated by the board, R1624.2(a),[1] although the entire board (not just those who were present at the appearance) must consider whether to reclassify the registrant after the appearance. R1624.2(c). At the personal appearance, the registrant discusses his case and may point to information in his file which the board may have overlooked. The following steps may be taken in order to strengthen the registrant's case:

1. *Submission of material.* At the appearance, the registrant may submit factual material bearing on his classification. R1624.2(b). He should prepare such material ahead of time, because typically there is no transcript of the appearance, and the regulations require him to submit the information in writing or prepare a written summary. R1624.2(b).

2. *Witnesses.* The board has discretion to hear witnesses.[2] The registrant should bring his witnesses with him, and tender them to the board. Whether a witness is permitted to testify or not, a written summary of the information he has should be submitted for placement in the registrant's file. The witnesses should usually be asked to write up their impressions of the board as well.

3. *Counsel.* The regulations prohibit anyone to be represented before the board by anyone acting as legal counsel. R1624.1(b). However, the prohibition may not be absolute.[3] Counsel seeking admission to personal appearances have in some cases been granted entrance, and counsel may be advised to seek admission to preserve the point of denial of counsel.[4]

4. *Transcript.* The registrant may wish to ask that a transcript be made. The regulations require that orally presented information be summarized by the registrant and placed in his file.[5] The registrant may wish to ask the board to permit him to tape record the session, and offer to place a copy of the tape in his file. The registrant with funds to bring a shorthand reporter may wish to do so. Denial of transcript, the right to tape record, and the right to bring a shorthand reporter is nowhere specifically authorized by the regulations, and may under some circumstances be error. However, claims to these rights may only serve to anger the board and distract its attention from a meritorious claim. Sound tactical judgment will dictate the course to be pursued. The registrant should be at pains to point out that since he bears a part of the burden of summarizing the appearance, R1624.1, he needs to have the proceedings taken down by someone other than himself so that he can concentrate on the proceedings and answer the member's questions.

5. *Writing up the appearance.* The registrant should in any case prepare a summary of the appearance and send it to the board for placement in his file. He should do this immediately after the appearance, and should make an effort to reproduce exactly what was said. An exact transcript of the session is better by far than a general statement such as "he seemed excited," or "the member appeared to be suspicious of my claim". The writeup should note who was present and what each said, and should record the beginning and ending time of the appearance. It should be reviewed by counsel to assist the registrant in recalling more details. It should be accompanied, when it is sent to the board, by a letter stating that the registrant believes his description of the events recited to be accurate in every detail, and requesting that the board let him know in writing if any detail is omitted, misstated or misinterpreted. The registrant should check his file to see if the board has written up the appearance, and should correct or refute derogatory information contained in the board's version.

1. The function of conducting personal appearances may not be delegated to the board clerk. United States v. Peterson, 53 F. Supp. 760 (N.D. Calif. 1944).

2. R1624.1(b). Logically, the registrant's employer and dependents are good witnesses in cases involving II-A and III-A requests. On witnesses generally and the denial of right to present them, see ¶ 1030 *supra,* Uffelman v. United States, 230 F.2d 297, 303-04 (CA9 1956) (no right to present witnesses to board). But it should be noted that in *Uffelman,* the court said that the registrant could not have been prejudiced by the refusal to hear witnesses, as the board had accepted summaries of their proposed testimony in the form of letters.

3. The subject of counsel is discussed at ¶ 1003 *et seq., supra.*

4. Sound tactics may dictate otherwise, however. See discussion *infra* this paragraph under "Transcript."

5. R1624.2(b). This obligation may override, by placing the onus on the registrant, the general obligation of the board to place in the file all information on which it relies in classifying the registrant. *See* R1626.13(a); LBM 52, para. 4; ¶ 1072 *supra.*

¶ 1081. Personal Appearance –– Special Problems of the CO Applicant

The applicant for a I-O or I-A-O classification should ask the board what he can do to convince them of his sincerity, and whether any particular aspect of his life or his conduct seems to them to militate against his classification as a CO. If the board cannot or will not identify the information it relies on in the file, the registrant should note this fact in his writeup. If the members appear prejudiced against him because of peace and civil rights activity, he may wish to point out that such activity should be regarded as supporting his

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claim.[1] Good questions to ask are suggested in the *Handbook for Conscientious Objectors*, cited in the *Bibliography*. The registrant seeking CO status may be particularly advised to bring witnesses, and to ask that a lawyer be permitted to come in to discuss with the board the very complex legal issues tendered by a CO claim. He might stress that given the abolition of the Justice Department hearing by the 1967 amendments, the burden he must bear is heavier than before, and having the board hear witnesses may make up for the lack of an FBI field investigation. The registrant may wish to see if the government appeal agent is sympathetic to his position. If so, the appeal agent should be asked to discuss the claim with the local board in advance of the hearing, to clear up misconceptions which the members may have concerning the legal foundation for it.

1. "Registrant's participation in civil rights activity, regarded with disfavor by many persons in the community where he lives . . . , is consistent with his adherence to personal principles in the face of opposition, *i.e.*, it is consistent with his present position seeking classification as a conscientious objector." Re Arrece Webb, SSN 22 59 46 44, Report of Hearing Officer Robertshaw, N.D. Miss., Oct. 14, 1967(available in facsimile from SSLR).

¶ 1082. Personal Appearance — Special Problems of the II-A Claimant

The II-A claimant would do well to provide the board with information on the critical character of his skill, occupation, or activity: charts, economic data, federal and state agency figures, the testimony – written and oral – of local business or professional persons. Objective information of this kind is most persuasive and builds a strong and convincing record. See ¶ 1054 *supra.*

¶ 1083. Personal Appearance — Special Problems of the III-A Claimant (Hardship)

The III-A claimant, in addition to bringing his dependent or dependents as witnesses, should be prepared with detailed financial and other records which he may have omitted to file with his Form 100 or other claim. See ¶¶ 1018, 1019, 1061. If his claim is based upon nonfinancial dependency, he should bring, or have statements from, the dependent, a doctor, minister, psychologist, welfare worker or other professional person who can testify to the basis for the dependency. Again, the board should be asked the basis for its initial denial of the claimed classification.

¶ 1084. Personal Appearance — Special Problems of the IV-D Claimant

In addition to detailed proof of the elements noted in ¶ 1065 *et seq. supra*, the IV-D claimant whose claim is based upon unorthodox religious activity should bring as witnesses and have statements from parishioners or others to whom he ministers. If he can bring or secure a statement from the leader of a more well-recognized faith stating that he fulfills the same role in relation to a group of worshippers as the witness bears to his own congregation, this can be valuable support. In his dialogue with the board, the claimant for IV-D should be assiduous to discover the basis in fact for the board's original denial, and particularly to determine if there is any feeling on the part of members that the claimant's teachings are not "religious", that his activity is not enough like that of a regular minister, that his secular activity interferes with his ministry, or that he is not sincere in his desire to become or remain a minister. See ¶ 1065 *et seq*.

I. Appeal to Appeal Board

¶ 1085. Personal Appearance Terminated — New Notice of Classification — Appeal

After the personal appearance the board is required to meet as a whole and again classify the registrant. Whether or not it retains him in the classification originally granted, the board must send a new notice of classification[1] and an advice of classification to every person having on file a current request for deferment of the registrant. R1624.2(c), (d). The registrant, any person claiming to be a dependent, and any person who prior to the classification filed a written request for the registrant's occupational deferment, have 30 days from the *mailing* of the new notice in which to mail and have postmarked a notice of appeal, R1626.2 (c), (e), except that these persons have sixty days to appeal if on the date of mailing the notice of classification it appears that the registrant is outside the continental United States, Hawaii, Alaska, Puerto Rico, the

1. Failure to send a new notice of classification with all the attendant notice of rights of appeal invalidates a subsequent order to report for induction. Atkins v. United States, 204 F.2d 269 (CA 10 1953), *cert. denied*, 346 U.S. 818 (1953) (dictum). However, in *Atkins*, the court found that the registrant had actual notice of the board's action, as shown by his having initiated an appeal in timely fashion and held the board's error cured.

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Virgin Islands, Guam, the Canal Zone, Canada, Mexico, or Cuba. R1626.1(c).[2] The notice of appeal must be in writing and may be a simple statement "I appeal." R1626.11. During the period set aside for taking an appeal, and during the pendency of the appeal, the registrant may not be ordered to report for induction, and any induction order issued during this period must be cancelled by the board. R1626.41.

At any time prior to the mailing of an order to report for induction, SSS Form 252, the board may permit the registrant, a dependent, or person claiming an occupational deferment for the registrant to appeal out of time if it finds the failure to appeal was based on a lack of understanding of the appeal procedures or another cause beyond the appellant's control. R1626.2(d).

The Director or State Director may take an appeal at any time. R1626.1. See ¶ 40 *supra*. The government appeal agent may take an appeal at any time before mailing of an order to report for induction or order to report for civilian work. R1626.2(b). See ¶ 45 *supra*. It is a good idea to take an appeal. The reversal rate is quite high in many jurisdictions, so an appeal is not fruitless.[3] Moreover, the taking of an appeal may be held necessary to exhaust the registrant's administrative remedies, although there is some authority to the contrary.[4]

2. Registrants who have registered under the provisions of Part 1655 of the regulations, see ¶ 1011 *supra*, have the same rights of appeal based on where they are living, but the right is set out in a different section of the regulations. R1655.20.

3. Ranging from under 1% reversals to over 50%. National Advisory Comm'n on Selective Service, In Pursuit of Equite: Who Serves When Not All Serve? 110-111 (1967).

4. *E.g.*, Wills v. United States, 384 F.2d 943, 945 (CA9 1967); United States v. Carson, 1 SSLR 3046 (E.D. Ark. 1968). *Cf.* Fay v. Noia, 372 U.S. 391 (1962).

¶ 1086. Appeal –– Statement of Issues

Although it is not required, the person appealing may attach to his statement that he appeals a statement setting out the manner in which he thinks the board erred, and directing the appeal board's attention to information in the file justifying his claim. He may set out in full material which the local board was asked to and refused to include in his file. R1626.12.[1] It is a good idea to follow this procedure, given the hasty consideration given most appeals.

1. Board failure to notify registrant of its classification action deprived him of right to submit statement on appeal, which is a substantial right. United States v. Fry, 203 F.2d 638 (CA2 1953). Under the former procedure whereby an appeal board might refer claims of conscientious objection to the Justice Department for hearing, a registrant was entitled to file a statement with the appeal board after the Department of Justice report was filed, as well as with the initial appeal. Gonzales v. United States, 348 U.S. 407 (1955).

¶ 1087. Appeal Procedure

Within five days after receiving the notice of appeal, the local board must forward it to the appeal board for its area, or if the appeal is to be transferred to another appeal board, as set out in ¶ 1088 *infra*, through the State Director to the appropriate board. R1626.13, 1626.14. The appeal board enters the registrant's name and number in a docket book, R1626.21, and proceeds to hear the appeal.[1] As a preliminary matter the board surveys the file to ensure that all pertinent papers are in it. If the file is incomplete is it returned to the local board to remedy the defect. R1626.23.[2]

In considering the merits of the appeal, the board is limited in making its decision to the information in the registrant's file and to official notice of current economic, social, and industrial conditions. R1626.24.[3]

1. Unless the board is disqualified from hearing the appeal "for any reason." Such reasons include those set out in R1604.25.

2. The board is obliged to place all information which it used in the file in summary form, excpet for statements of a registrant during a personal appearance, which statements the registrant must summarize. See ¶¶ 1072, 1080 *supra*. The mandatory requirement that the file be complete is reinforced by the provision in R1626.13 for board review of the file prior to forwarding it to the appeal board. R1626.13, and by the requirement of R1626.23 that the appeal board preliminarily review the file not only to see if everything the local board relied on is in it, but generally to see if "the information is . . . sufficient to enable the appeal board to determine the classification of the registrant." The local board must forward not only the file, but relevant sections of its minutes and any statements justifying its action which were noted in its records. Smith v. United States, 157 F.2d 176 (CA4 1946), *cert. denied*, 329 U.S. 776 (1946); Niznik v. United States, 173 F.2d 328 (CA6 1949), *cert. denied*, 337 U.S. 925 (1949).

3. There is no provision that the appeal board make a record of its reliance upon information officially noticed in this manner. The procedure is therefore arguably deficient for failure to enable the registrant to know and to rebut all the information used against him. See the discussion at ¶ 1072 *supra*. *But see* United States v. Hagaman, 213 F.2d 86 (CA3 1954), holding that the National Appeal Board not only needed a basis in fact to deny the registrant's I-O claim, but was required to record the basis in fact in the file. *Hagaman* relied on United States *ex rel.* Reel v. Badt, 141 F.2d 845, 848 (CA2 1944), in which the court stated it to be preferable for appeal boards to note whether or not they accepted or rejected Justice Department hearing officer findings of fact and conclusions of law. Absent such a record, it must be presumed that the boards followed any erroneous finding or conclusion in the Department report. *See* Sicurella v. United States, 348 U.S. 345 (1955). The general "basis in fact" rule may also be a corrective to the official notice provisions discussed in the text, for if material officially noticed is to be the basis for denial of a claimed classification there will be nothing in the file to support the denial unless the board places some memorandum there indicating the facts of which is has taken notice.

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he appeal board may not consider *ex parte* communications volunteered by persons not party to the ap- eal, where these communications are volunteered in hostility to the registrant.[4] Technically, the appeal oard is to consider the registrant's case *de novo*, and its decision is often said to suprecede that of the lo- al board.[5] The practical effect of this procedure is that local board errors are often held cured by the appeal oard's review of the case, even though the appeal board decision is the same as the local board's.[6] Other rong authority has it, however, that the registrant is entitled to fair and full consideration of his case at very stage and that the action of the appeal board does not cure local board error.[7] The teaching of these ases finds echo in analogous decisions by the Supreme Court.[8]

After the appeal board considers the registrant's case and decides upon his classification, the file is re- rned to the local board with a notation of the board action and the votes cast for and against. R1626.27. he local board is to mail a new notice of classification to the registrant, showing the appeal board vote, nd advices of classification to every person who has on file a current request for the registrant's deferment. .1626.31.

During the pendency of an appeal, the board may not order a registrant to report for induction. .1626.41.

4. Storey v. United States, 370 F.2d 255 (CA9 1966) (dic- ım).

5. Sometimes this requirement is stated positively, as a com- ıand that the appeal board consider the entire file of the registrant. *.g.*, Sterrett v. United States, 216 F.2d 659 (CA9 1954). But other ases hold that board failure to provide an unbiased hearing may be ured by the appeal board's de novo classification of the registrant. *.g.*, United States v. Jones, 142 F. Supp. 806 (E.D.S.C. 1956), *aff'd*, 41 F.2d 704 (CA4 1957). As the discussion in the text accompa- ying notes 7 and 8 indicates, this line of authority is open to sub- tantial challenge.

6. See authorities cited note 5 *supra*.

7. *E.g.*, United States v. Peebles, 220 F.2d 114 (CA7 1955); lintz v. Howlett, 207 F.2d 758 (CA2 1953). *Cf.* Knox v. United tates, 200 F.2d 398 (CA9 1952).

8. *E.g.*, *In re* Gault, 387 U.S. 1, 32-33 (1967). Failure of au- thorities to provide notice in constitutional form prior to the first judicial hearing in a juvenile delinquency case was not cured by pro- vision of notice at that hearing and opportunity, at subsequent hear- ing, to present evidence and rebut charges. The meaning of this hold- ing for purposes of the present discussion is that procedural defects at a hearing "on the merits" can be cured only by regarding the de- fective hearing as abortive and of no effect and scheduling it anew. The analogy is particularly powerful in the Selective Service context since only at the local board level is the registrant entitled to a per- sonal appearance. Thus, many defects in procedure at the local board level can never be made up by appeal board classification of the reg- istrant de novo. In this connection, *cf.* United States v. Laier, 52 F. Supp. 392 (N.D. Calif. 1943) (failure to grant personal appearance not cured by appeal board's de novo consideration of file).

¶ 1088. Transfer of Appeal — Occupational Deferment Cases, Other Cases, Disqualification

A registrant's appeal may, on written request to the local board, be transferred under the following ircumstances:

1. *Occupational deferment.* At the request of a registrant or other person appealing, an appeal involving claim of occupational deferment must be transferred to an appeal board having jurisdiction over the area n which the registrant's place of employment is located, unless the place of employment is not located vithin the area of any appeal board, in which case the appeal is sent to the appeal board for the area in vhich the local board is located. R1626.1(b), 1626.13(b).

2. *Transfer to appeal board at registrant's residence.* Upon the request of the registrant, the Director or he State Director, the appeal must be transferred to the appeal board for the area where the registrant re- ides. If there is no appeal board for the area wherein the resident resides, his appeal goes to the appeal oard for the area in which his local board is located. See ¶ 41 *supra* for a discussion of the location of ap- eal boards.

3. *Disqualification of Appeal Board.* If the appeal board or panel is disqualified for any reason, see 1604.25, then the State Director assigns the case to another panel, or if there is no other panel, to another oard within the state, or if there is none then to an appeal board in a neighboring state designated by the Director.

¶ 1089. Reconsideration By Appeal Board

An appeal board must reconsider its decision upon request in writing at any time by the Director or State Director, who may request reconsideration "in the national interest or necessary to avoid an injustice." 1626.61(a). A registrant aggrieved by an appeal board decision should seriously consider asking the inter- ession of the Director and the State Director.

At any time before an order to report for induction or for civilian work is issued, the government ap- eal agent may write, with a copy to the registrant's file, the State Director asking him either to seek recon- ideration or appeal to the President. R1626.61(b). This course is often preferable to the registrant himself eeking help from the State Director, for the government appeal agent will generally review the registrant's

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file and then send it along to the State Director if he recommends that the State Director act. This procedure has the effect of removing the file from the local board office and making it impossible for an induction order to be issued. The registrant may, of course, seek the aid of the State Director and the government appeal agent at the same time.

J. Appeal to National Selective Service Appeal Board

¶ 1090. Appeals Beyond the Appeal Board –– Generally

If a registrant is classified by the appeal board in a class higher than that to which he feels himself entitled, he should seek additional avenues of appeal. Even if the appeal board has classified him in a lower classification than that in which the local board placed him, the registrant may seek to obtain the lowest classification to which he feels entitled. Reconsideration by the appeal board is one avenue of appeal from an adverse determination. See ¶ 1089 *supra*. The other means of obtaining review of an appeal board decision is by appeal to the National Selective Service Appeal Board, which exercises all appellate functions committed to the President by the Act. See ¶ 39 *supra*.

¶ 1091. Appeal to the President or National Board –– Who May Appeal –– How Appeal Is Begun

The appeal to the National Selective Service Appeal Board (National Board) is conducted as follows:

1. The Director may appeal at any time to the National Board, in the national interest or to avoid an injustice. R1627.1(a). He lodges an appeal by writing to the local board and placing a notice in the registrant's file. R1627.1(b).

2. Either the State Director for the state within which the appeal board is located, or the State Director for the state in which the local board is located, R1627.2, may take an appeal to the National Board by writing to the local board directing it to send the registrant's file to him for transmittal to the Director in Washington, D.C., and by placing a notice of appeal in the registrant's file. R1627.1(c).

3. The registrant, a person claiming to be a dependent, or any person who prior to local board action filed a written request for the registrant's occupational deferment may appeal to the National Board only if there was a dissenting vote on the appeal board. An appeal under these circumstances must be taken within thirty days of the mailing of the notice of classification to the registrant by the local board, notifying him of the action of the appeal board. But the local board may extend the time for taking an appeal for good cause. R1627.3. The appeal is taken by written notice of appeal, which need not be in any particular form. However, the registrant is well-advised to use the notice of appeal to set forth in detail his contentions concerning his classification.

During the pendency of a Presidential appeal, the registrant may not be inducted. R1627.8.

If the appeal is taken by any person other than the registrant, the local board is required by R1627.5 to notify the registrant.[1]

1. But if the board fails to notify the registrant, the jurisdiction of the National Board has been held not to be affected. United States *ex rel.* Woodward v. Deahl, 151 F.2d 413 (CA8 1945).

¶ 1092. Appeal to National Board –– Preliminary Review

On a presidential appeal, the file is first sent to the State Director, who examines it to see if all procedural steps have been complied with, including the provision for notifying the registrant that an appeal has been taken, R1627.5(b). If not, he returns the file to the board for correction. *Id.* If there is any information in the file which was not considered by the local board in classifying the registrant, the State Director must review the information, and if he finds that, if true, it would justify a different classification, he must return the file to the board with directions to reopen the registrant's classification and classify him anew. *Id.*[1] After his review, the State Director, if he has not returned the file to the local board, forwards it to the Director.

1. In this event, the registrant apparently has all the personal appearance and appeal rights provided in the case of an initial classification. There is no explicit provision in the regulations to this effect, but R1625.11-1625.14, providing for procedure upon classification anew, are broad enough to cover such a case.

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¶ 1093. Appeal to National Board – Procedure

The National Board's procedure is nowhere set forth in the regulations except in the most general terms. See ¶ 39 *supra;* R1627.5. R1627.5(c) contemplates that the appeal shall be processed through the Director, to whom the registrant's file is to be sent after preliminary review by the State Director. As a practical matter, the file is reviewed by personnel in the National Office, and their recommendations may form a part of the record reviewed by the National Board. The review within National Headquarters provides an opportunity for the registrant and his counsel to secure the assistance of personnel in that office in seeing that the registrant's contentions are presented to the National Board. See ¶ 1094 *infra.* Of course, the review procedure also provides yet another opportunity for influence by the registrant and his counsel upon the decision-making structure of the system.[1] The National Board must have solid evidence upon which to base its decision concerning the classification of the registrant.[2]

1. The procedure has been upheld. United States *ex rel.* Brandon v. Downer, 139 F.2d 761 (CA2 1944). But that was in a day when courts were less concerned over individual liberty and the fundamental procedural rights of confrontation and notice. See ¶ 1072 *supra,* and the authorities there cited; ¶ 1087 n.8.

2. *E.g.*, United States v. Wilson, 215 F.2d 443 (CA7 1954). National Board denial of I-O classification, after granting of I-O by local board and appeal board, void for want of basis in fact.

¶ 1094. Appeal to National Board –– Practical Considerations in Seeking Appeal

The registrant who does not have an appeal of right – the usual case – should simultaneously enlist the aid of the State and National Directors in seeking an appeal to the National Board. See ¶¶37, 40 *supra.* In his letters to them, he should point to information in his file which the local board may have overlooked, to evidence of hasty consideration or application of improper standards. His presentation should be reasoned and thorough. If he has counsel, counsel should write also and make appropriate legal arguments. In seeking the aid of the National Director, letters should be sent to the attention of the General Counsel, whose name will be listed in the current Government Organization Manual. Addresses of State Directors are listed at R1606.58(f), and letters should be sent to the attention of the legal officer if there is one in the registrant's state. In writing letters to System lawyers, a lawyer-to-lawyer approach is often helpful. Emphasize the real prejudice to the registrant which may flow from the board action complained of, and underline procedural defects which have been judicially found to void the board's classification.

An alternative approach, and one which may commend itself to some registrant's and their attorneys, is for the registrant to write and discuss his complaint in general terms arguing that an injustice has been done him. This approach may be followed by the registrant who is reluctant to invoke the name of counsel, or by the registrant whose case dictates that detailed discussions of procedural imperfections is unwise because the System may be given a chance to clean up the record, properly classify the registrant I-A and induct him based on a procedurally defensible order to report. There is no hard and fast rule; sound tactics rather than over-arching principles of decision are called for. The registrant should not feel that seeking a National Board appeal is fruitless. While in fiscal 1965 there were only 163 appeals to the National Board, the number rose to 798 in fiscal 1966 and to 2175 in fiscal 1967.[1]

1. Annual Report of the Director of Selective Service for the Fiscal Year 1967, at 26 (1968), available from the Superintendent of Documents, Washington, D.C. 20408, for $1.50.

K. Reopening a Registrant's Classification

¶ 1095. Reopening a Classification –– Classification Anew –– The Concept of Reopening –– Regulatory Provisions

Upon reopening, the determination of a registrant's qualification for deferment or exemption begins again, and the renewed consideration of his claim activates all the rights of personal appearance and appeal to which he was entitled in the initial classification process. Reopening is more than a mere review of the file.

At any time when there come to light facts which might justify a change in the registrant's classification, the local board may be prevailed upon to reopen the registrant's classification and classify him anew. If new facts come to the board's attention, it may of its own motion reclassify the registrant. The discussion which follows sets out the reopening procedure provided in the regulations; later sections set out the judicial gloss on the regulatory language.

Reopening is accomplished by any of three means: First, if the registrant, a person claiming to be a dependent, a person who has on file a request for occupational deferment[1] of the registrant, or a government appeal agent should file a request in writing setting out facts which, if true, would justify reclassification, or if

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the board of its own motion decides that such facts exist, then the board may[2]reopen. In either event, the board may not reopen after mailing an order to report for induction or for civilian work unless it finds that there has been a change in the registrant's status resulting from circumstances over which he had no control. R1625.2. Second, if the State Director or National Director requests reopening, the board *must* reopen. R1625.3(a). Finally, if the board receives facts that one ordered to report for induction is entitled to a I-S(C) classification, it must cancel the order and place him in that classification. R1625.3(b). A reopening by a local board cancels any outstanding order to report for induction or for civilian work, except that if the registrant has failed to comply with either of these orders, reopening for the purpose of placing him in Class V-A (over age) or IV-C (alien) will not cancel the order with which he failed to comply. R1625.14.

Crucial to the concept of "reopening" is "classification anew." When the board reopens a registrant's classification and reconsiders his case, it is considered to have classified him anew, and all the procedural consequences which attach to an initial classification attach as well to such an action. The registrant has the same rights of personal appearance and appeal that he had at the time the board first classified him. R1625.11-1625.13. The board must mail a new notice of classification to the registrant, and new advices of classification to all those having on file current requests for his deferment, as soon as practicable after reopening the registrant's classification. R1625.12.

1. On April 23, 1970, the President amended the regulations to terminate this deferment prospectively. See *Newsletter*, 2 SSLR 57.

2. But see ¶ 1096, *below*.

¶ 1096. Reopening a Classification—Checks on Board Discretion

A direction by the State Director or National Director to reopen is the most effective means of securing reopening. R1625.3(a). In individual cases, such a direction may be secured through letters and personal visits to these officials or their subordinates. In addition, some State Directors have a policy of requiring reopening in particular classes of cases, which policies are embodied in memoranda issued by the State Director's office.

The discussion below, however, concentrates upon the general question of the local board's obligation to reopen a registrant's classification, in the absence of a direction to do so, when the registrant submits new information bearing upon his status. R1625.4 seems to say that the board may consider the registrant's entire file without giving him a personal appearance or appeal from its decision by the simple expedient of terming its action a "denial of reopening," whereas if it were to reopen his classification, it would have to afford these rights even if it retained him in the same class. R1625.11. The possibilities for abuse in such a system have led to judicial checks upon it.

In *Mulloy v. United States,* 398 U.S. 410, 3 SSLR 3011 (1970), the Supreme Court, in a unanimous decision, reversed the conviction of a registrant who had been denied a reopening of his classification by his local board. The opinion of the Court, written by Justice Stewart, set out the standard for the reopening of a classification under R1625.2: "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 reclassification, 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."

The Court, following many prior court of appeals and district court decisions,[1] held that it is an abuse of discretion under R1625.2 for a local board not to reopen a classification upon the presentation of a prima facie case for a new classification : and "if the refusal to reopen was improper, petitioner was wrongly deprived of an essential procedural right, and the order to report for induction was invalid." The standard formulated by the Court, and quoted above, is based upon the registrant's "allegations of facts." These allegations must not be frivolous and must not have been previously considered by the local board. The board must take such allegations to be true in determining whether a prima facie case is presented. If the information presented would be sufficient, under either the regulations or the statute, to permit granting the reclassification requested, then the local board must reopen. The only exception to this right of reopening is when "the truth of these new allegations is *conclusively* refuted by other *reliable* information in the registrant's file." (Emphasis added.) The Court thus rejected not only the Sixth Circuit's interpretation of R1625.2, which would have allowed the board to go outside the file to determine whether or not a prima facie case had been presented, but also the notion that any contradictory evidence in the file could serve to deny a reopening.

The Court decided that the registrant's Form 150 and accompanying letters had presented a prima case and that the refusal to reopen had effectively denied him administrative review of his claim. The government had contended that the registrant's statements or demeanor at the courtesy interview undercut his prima facie case. The Court rejected this, stating "it is on precisely such grounds as these that Board action cannot be predicated without a reopening of the registrant's classification . . ."[2] The Court went on to state: "The Board

1. *E.g.*, Miller v. United States, 1 SSLR 3014, 388 F.2d 973 (9th Cir. 1967). United States v. Freeman, 1 SSLR 3012, 388 F.2d 246 (7th Cir. 1967).

2. The concept of "de facto reopening" arose as an alternative theory of attack on refusals to reopen. Conceding in principle that reopening was discretionary, this theory argued that if the merits of a claim were in fact reached, procedural rights could not be cut off by a nominal refusal to reopen. Since *Mulloy* has established that it is an abuse of discretion not to reopen upon presentation of a prima facie claim, the de facto reopening issue is largely obsolete. However, there remain cases in the area of post-induction order refusal to reopen, where the applicability of *Mulloy* is still contested and the de facto reopening concept may have independent vitality. See ¶ 1096:1.

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could not deprive the petitioner of the procedural protections attending reopening by making an evaluative determination of his claim while purportedly declining to reopen his classification."

A further issue with respect to reopening has been the availability of preinduction judicial review of refusals to reopen. Several courts have held that a wrongful refusal to reopen in contravention of *Mulloy* is a "blatantly lawless"[3] act. Thus, allegations that the loal board refused to reopen upon presentation of a prima facie claim confer jurisdiction on the courts to enjoin induction. The reasoning behind this view is essentially that the board has a clear duty under the regulations to reopen in such a case, and refusal to do so is a denial of procedural due process.[4]

Other courts, however, have held that an exercise of discretion is necessarily involved in refusing to reopen, since it is at least partly a question of fact whether a prima facie claim was made. Thus these courts held preinduction review barred by § 10(b) (3).[5]

The question is a close one, exemplifying broader disagreements about the scope of preinduction review of procedural errors.[6]

The information submitted in a request for reopening should be as complete as possible. The registrant should strive to state a strong prima facie claim for deferment, and so forestall the danger that a court will find a denial of reopening not prejudicial to him.

More specifically, the requirements for a prima facie claim consist of detailed, and as far as possible documented, allegations that amply satisfy the regulatory requirements for the deferment in question. For example, a prima facie hardship claim has been held to require allegations that the registrant's induction would cause *extreme* hardship to a dependent to whose support the registrant has been *substantially contributing* (and who has *no alternative* provider available) (emphasis added).[7] Likewise, a prima facie case for student deferment requires satisfactory pursuit of a full-time course of study, as defined in the regulation, R1622.25. On the requirements for prima facie cases generally, see the sections on classifications in this manual (¶¶ 1032–71), Part 1622 of the Regulations, and cases thereunder in the Regulation Citator.[8]

3. *See* Oestereich v. Local Bd. No. 11, 393 U.S. 233, 1 SSLR 3215 (1968).

4. Hunt v. Local Bd. No. 197, 3 SSLR 3647 (3d Cir. 1971); Swift v. Tarr, 3 SSLR 3839 (D.C. Cir. 1971); Piendak v. Local Bd. No. 5, 3 SSLR 3854, 318 F.Supp. 1393 (W.D. Pa. 1970); Rhem v. Local Bd. No. 104, 3 SSLR 3437 (W.D. Wis. 1970).

5. Lane v. Local Bd. No. 17, 3 SSLR 3759 (1st Cir. 1971); Ferrell v. Local Bd. No. 83, 3 SSLR 3395, 434 F.2d 686 (2d Cir. 1970); Edwards v. Local Bd. No. 111, 3 SSLR 3253, 432 F.2d 287 (5th Cir. 1970); Ryan v. Hershey, 3 SSLR 3929, 308 F.Supp. 285 (E.D. Mo. 1969).

6. *See generally* ¶ 3530.

7. Petrie v. United States, 1 SSLR 3104 (9th Cir. 1968), *rev'd*, 1 SSLR 3328, 407 F.2d 267 (9th Cir. 1969); U.S. *ex rel.* Rasmussen v. Commanding Officer, 3 SSLR 3221, 430 F.2d 832 (8th Cir. 1970); Spencer v. Bradley, 3 SSLR 3444 (W.D. Mo. 1970); U.S. *ex rel.* Jones v. Vallerie, 3 SSLR 3456 (W.D. Mo. 1970); Warwick v. Volatile, 3 SSLR 3597, 317 F. Supp. 362 (E.D. Pa. 1970); Brede v. Allen, 3 SSLR 3641, 311 F.Supp. 599 (N.D. Ohio 1969).

8. II-A Occupational Deferment: U.S. *ex rel.* Spergel v. Commanding Officer, 3 SSLR 3285 (E.D.N.Y. 1970); United States v. Noonan, 3 SSLR 3511 (N.D. Cal. 1970).

II-C Agricultural Deferment: United States v. Howze, 3 SSLR 3056 (9th Cir. 1970).

IV-D Ministerial Exemption: United States v. Bittinger, 3 SSLR 3628, 434 F.2d 49 (4th Cir. 1970).

I-O Deferment: *e.g.*, United States v. Garvin, 3 SSLR 3698 (7th Cir. 1971).

¶ 1096:1. Post-Induction Order Reopening

R1625.2 states simply that a board may not reopen the classification of a registrant who is under an induction order unless it first specifically finds that there has been a change in his status due to circumstances beyond his control. The validity of this provision has been upheld.[1]

Some courts have held that by the same token, the board may not properly refuse to reopen after issuing an induction order unless it first specifically finds "no change in circumstances."[2] This is a species of the more general requirement that boards state reasons for their decisions.[3] It also expresses the policy that even in the post-induction order case, refusal to reopen cannot be arbitrary. Where the registrant properly alleges an involuntary change in status together with facts entitling him to a deferment, some courts have held the rule of *Mulloy* to apply.[4] The idea of these cases is simply that after an induction order issues, the prima facie case

1. *E.g.*, United States *ex rel.* Johnson v. Irby, 3 SSLR 3769 (5th Cir. 1971); United States v. Angelico, 3 SSLR 3106, 427 F.2d 288 (7th Cir. 1970); United States v. Walker, 3 SSLR 3203, 424 F.2d 1069 (1st Cir. 1970).

2. United States *ex rel.* Brown v. Resor, 3 SSLR 3188, 429 F.2d 1340 (10th Cir. 1970); Spencer v. Bradley, 3 SSLR 3444 (W.D. Mo. 1970).

3. United States v. Broyles, 2 SSLR 3562, 423 F.2d 1299 (4th Cir. 1970); United States v. Haughton, 2 SSLR 3173, 413 F.2d 736 (9th Cir. 1969); *see generally* ¶ 1073:1.

4. United States *ex rel.* Brown v. Resor, 3 SSLR 3188, 429 F.2d 1340 (10th Cir. 1970); Lane v. Local Bd. No. 17, 3 SSLR 3759 (1st Cir. 1971); Rhem v. Local Bd. No. 104, 3 SSLR 3437 (W.D. Wis. 1970); United States v. Madden, 3 SSLR 3493, 314 F.Supp. 804 (D.N.H. 1970); *cf.* United States *ex rel.* Smith v. Commanding Officer, 3 SSLR 3381, 318 F.Supp. 571 (E.D. Wis. 1970); United States v. Arneson, No. 20346 (8th Cir. March 31, 1971). *But see* Ferrell v. Local Bd. No. 83, 3 SSLR 3395, 434 F.2d 686 (2d Cir. 1970); United States v. Pacheco, 3 SSLR 3385, 433 F.2d 914 (10th Cir. 1970); United States v. Jones, 3 SSLR 3268, 433 F.2d 1292 (2d Cir. 1970); United States v. Harris, 3 SSLR 3787, ___ F.2d ___ (6th Cir. 1971); *cf.* Scott v. Commanding Officer, 3 SSLR 3277, ___ F.2d ___ (3d Cir. 1970).

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needed to compel reopening includes the new element of non-frivolous allegations, not conclusively refuted by the file, that the proviso of R1625.2 has been met.

A second problem arises where the board finds "no change in status" but also considers the claim on its merits. Some courts have refused to find de facto reopening on the ground that reopening cannot have occurred absent the finding called for by regulation 1625.2.[5] This circular argument might be replaced with the stronger contention that there is no prejudice in considering the merits where reopening would be unauthorized. However, there may be at least one situation in which de facto reopening could be prejudicial even if no change of status could be shown. An application for CO discharge from the army will not be considered if previously rejected by the Selective Service System, and this has been taken to mean, rejected *on the merits* by Selective Service.[6] Thus if a local board reaches the merits of a post-notice CO claim and denies the claim, the registrant is worse off in terms of his prospects for discharge than if the board had failed to reach the merits. Where the board at the same time reaches the merits and denies reopening, it thus deprives the registrant of a full hearing both prior to induction and after induction, by which deprivation he is clearly prejudiced.

However, it has been held in some jurisdictions that the correct procedure for post-notice claims is for the board to decide both the threshold question of change in status and the merits of the claim together, make appropriate findings, and either deny reopening or reopen and reclassify the registrant, as the case may be.[7] This procedure seems clearly inconsistent with the reasoning and policy of *Mulloy*.

An important issue under R1625.2 is what sorts of change in status qualify as "beyond the registrant's control." Generally accepted are: death or illness of a dependent (hardship claim), illness of registrant (medical deferment), pregnancy of wife (dependency deferment),[8] and in some jurisdictions, "crystallization" of conscientious objection to war.[9] In contrast, acquisition of occupational and II-S student deferment status has ordinarily not been accepted.[10]

It has been held that post-notice reopening might be required where the registrant was reasonably unaware of a condition that arose before issuance of the order,[11] and also where the late filing of a claim was excused by misunderstanding of the law, where this was due to misleading action of sthe Selective Service System.[12] It has also been held that if the induction order is improperly addressed, and the new information is presented to the board before the registrant receives the order, the board must consider the information.[13]

Where reopening is denied without teaching the merits, but solely on the ground of "no change in status", courts have held that this determination must have a basis in fact.[14]

The "change in status" proviso may sometimes be circumvented entirely by action of the State or National Directors, empowered under R1625.3 to order or simply to authorize local board consideration on the merits of a post-notice claim. It is clear that where such action has been taken, *Mulloy* will apply with full force to a later decision not to reopen.[15]

A number of cases raise the issue whether a claim first presented after the date on which the registrant was ordered to report (or submit) must be considered by the board; and the further issue as to the effect on the registrant's vulnerability to prosecution of actions taken by the board subsequent to his refusal of induction.

Although R1625.14 seems to give the board power to reopen even at this stage, there is a consensus that reopening is not mandatory.[16] It is generally agreed that refusal to reopen could not in any case provide a defense to a crime already committed, and some courts have stated that even if the board *does* reopen—or reaches the merits while purporting not to reopen—the induction order is not cancelled.[17]

5. Scott v. Commanding Officer, 3 SSLR 3277, ___ F.2d ___ (3d Cir. 1970); United States v. Blackwell, 3 SSLR 3305, 310 F.Supp. 1152 (D. Me. 1970). *But see* Lubben v. Local Bd. No. 27, 3 SSLR 3292, 316 F.Supp. 230 (D. Mass. 1970)); United States v. Kerwin, 3 SSLR 3930, 313 F.Supp. 781 (D. Minn. 1970); Kurjan v. Commanding Officer, 3 SSLR 3118, 314 F. Supp. 213 (E.D. Pa. 1970).

6. Baker v. Laird, 3 SSLR 3218, 316 F.Supp. 1 (N.D. Cal. 1970); Peterson v. Laird, 3 SSLR 3210 (N.D. Cal. 1970).

7. United States v. Gearey, 368 F.2d 144, *aff'd,* 379 F.2d 915 (2d Cir. 1966); Paszel v. Laird, 2 SSLR 3591, 426 F.2d 1169 (2d. Cir. 1970); Scott v. Commanding Officer, 3 SSLR 3277, ___ F.2d ___ (3d Cir. 1970). *But see* United States v. Nordloff, 3 SSLR 3546, ___F.2d ___ (7th Cir. 1971).

8. Talcott v. Reed, 217 F.2d 360 (9th Cir. 1954). *But cf.* United States v. Wroblewski, 3 SSLR 3261, 432 F.2d 422 (9th Cir. 1970); United States v. Dell'Anno, 3 SSLR 3725, 436 F.2d 1198 (9th Cir. 1971).

9. United States v. Gearey, *supra* note 7; United States v. Hosmer, 3 SSLR 3728, 434 F.2d 209 (1st Cir. 1970); Scott v. Commanding Officer, *supra* note 4; United States v. Nordloff, 3 SSLR 3546 (7th Cir. 1971); United States v. Pacheco, *supra* note 4; Swift v. Tarr, 3 SSLR 3839 (D.C. Cir. 1971).

10. *E.g.,* Dillon v. Local Bd. No. 236-A, 3 SSLR 3954, 308 F.Supp. 909 (N.D. Ohio 1970); Clark v. Commanding Officer, 3 SSLR 3121, 427 F.2d 7 (3d Cir. 1970); *cf.* Reisner v. Lonsdorf, 3 SSLR 3505, 306 F.Supp. 481 (E.D. Mo. 1969). *But see* United States v. Sampson, 3 SSLR 3056, ___ F.2d ___ (4th Cir. 1970).

11. Wright v. Local Bd. No. 105, 3 SSLR 3407, 319 F. Supp. 509 (D. Minn. 1970).

12. Petersen v. Clark, 1 SSLR 3241, 289 F.Supp. 949 (N.D. Cal. 1968), *rev'd,* 2 SSLR 3112, 411 F.2d 1217 9th Cir. 1969); United States v. Buckles, 3 SSLR 3883 (N.D. Cal. 1971); Piendak v. Local Bd. No. 5, 3 SSLR 3854, 318 F. Supp. 1393 (W.D. Pa. 1970). *Compare* Kulas v. Laird, 3 SSLR 3353, 315 F. Supp. 345 (E.D.N.Y. 1970); United States v. Grochowski, 3 SSLR 3380 (E.D. Wis. 1970); United States v. Herold, 3 SSLR 3563 (E.D. Va. 1970); Lidster v. Sutherland, 3 SSLR 3509 (W.D. Ky. 1970).

13. *In re* Abramson, 196 F.2d 261 (3d Cir. 1952); *see also* United States v. Stafford, 1 SSLR 3040, 389 F.2d 215 (2d Cir. 1968).

14. Scott v. Commanding Officer, *supra* note 4; Kurjan v. Commanding Officer, *supra* n. 5; Garrell v. Volatile, 3 SSLR 3606, 312 F.Supp. 386 (E.D. Pa. 1970); Ferrell v. Local Bd. No. 83, *supra* note 4; *see also* Clark v. Commanding Officer, *supra* note 10.

15. Miller v. United States, 1 SSLR 3014, 388 F.2d 973 (9th Cir. 1967); United States v. Aufdenspring, 3 SSLR 3832 (9th Cir. 1971).

16. United States v. Stoppelman, 1 SSLR 3299, 406 F.2d 127 (1st Cir. 1969); United States v. Daniell, 3 SSLR 3830, 435 F.2d 834 (1st Cir. 1970).

17. United States v. Noonan, 3 SSLR 3519, 434 F.2d 582 (3d Cir. 1970). *But see* United States v. Lloyd, 3 SSLR 3171 (9th Cir. 1970).

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However, it has been held that refusal to even consider a post-induction date claim was a denial of due process,[18] and elsewhere held that if a claim is submitted on or before the induction date, errors in processing subsequent to the refusal could be raised by way of defense at trial.[19] Another court has vacated a conviction to give the State Director an opportunity to exercise his discretion to order reopening under R1625.3, where he had ignored a previous request to do so.[20]

The better view would seem to be that which follows the policy of the regulations in permitting the board in appropriate cases to forgive the lateness of an otherwise valid claim. The rules discouraging post-induction order claims are more than forum-apportioning devices insofar as the army's standards, *e.g.* for hardship or medical discharge, differ from those of the Selective Service System. The narrow scope of judicial review of decisions adverse to registrants argues further that courts should respect decisions to reopen under R1625.14.

18. United States v. Shermeister, 2 SSLR 3492, 425 F.2d 1362 (7th Cir. 1970); United States v. Johnson, 3 SSLR 3335, 310 F. Supp. 624 (E.D. Wis. 1970).

19. United States v. Nordloff, *supra* note 9; United States v. Mieczkowski, 3 SSLR 3783 (E.D. Pa. 1971).

20. United States v. Lloyd, *supra* note 17.

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¶ 1097. Changes in Status—Duty to Report

As a corollary of the reopening provisions, including the provision of R1625.1(a) that "No classification is permanent," the regulations impose duties upon the registrant and the board to ensure that the registrant's file contains up-to-date and accurate information on the registrant's status. R1625.1(b). The registrant must keep his board informed of all matters coming to his attention which may affect his classification, as must each person who has filed a request for the registrant's deferment. R1625.1(b). The information must be forwarded to the board within 10 days of the change in status.

Moreover, the board has the power and is urged to keep abreast of its registrants' activities by questioning registrants, physically examining and re-examining them, asking police officials and other agencies to conduct investigations, and taking other steps deemed necessary to keep in touch with registrants. R1625.1 (c). "Any other person" is urged in precatory language to report information to a local board which may affect a registrant's classification. *Id.*

The duty to report changes in status may be enforced through the criminal laws, see ¶¶ 2526-30. But if a registrant does not comply with specific board requests for information, it has been argued that the board may consider that he has not dispelled the presumption that he is available for service, and retain him or place him in Class I-A.[1] It has also been contended by System officials that failure to notify the board within ten days of facts which would justify a lower classification may be a waiver of the right to that classification.[2] Neither question is authoritatively resolved by the very scanty case law.

1. *Cf.* United States v. Crocker, 3 SSLR 3629, 313 F.Supp. 831 (D.Minn. 1970) *But see* United States v. Trimble, 3 SSLR 3506, 314 F.Supp. 186 (E.D. Pa. 1970).

2. *Cf.* United States v. Kroll, 1 SSLR 3247, 400 F.2d 923 (3d Cir. 1968); Garrell v. Volatile, 3 SSLR 3606, 312 F.Supp. 386 (E.D. Pa. 1970).

L. Delinquency

¶ 1098. Delinquency — Generally

The declaration of delinquency by the local board for failure to perform any duty or duties required by the Act or regulations, except the duty to comply with an order to report for induction or for civilian work, and the automatic acquisition of delinquency status for failure to perform either of the latter two duties, constitutes an informal process within the system for enforcement of its regulations and for reference of registrants' names to prosecutorial authorities. The most immediate effect of delinquency is reclassification and the call for induction or for civilian work out of turn, for delinquents who are classified I-A, I-A-O, or I-O are first in the order of call, even ahead of volunteers. R1631.7. The distinction between those declared delinquent and those automatically delinquent should be attended, for it marks as well a distinction in procedural rights.

¶ 1099. Delinquency — Declaring Registrant Delinquent

The board, when it receives information that a registrant has done or failed to do some act which is required to be omitted or performed under the Act or regulations, must follow a prescribed procedure if it decides to declare the registrant delinquent. (It need not declare him a delinquent.) R1642.4(a). It must send him a Delinquency Notice (SSS Form 304), setting out the duty or duties which he failed to perform, and file a copy in his cover sheet. R1642.4(b). The Form 304 constitutes notice of the board's opinion that the registrant is delinquent, warns him that violation of duties imposed by the Act is a criminal offense, and states that he may be reclassified and ordered to report for induction if the delinquency is not purged. Form 304 orders the registrant to get in touch with his local board or with the local board nearest him. The Form 304 thus is intended to provide a vital notice-giving function, telling the registrant that he may be in line for priority induction unless he successfully invokes the board's power to remove him from delinquency status "at any time." R1642.4(c).[1] The basis for the declaration of delinquency is usually some failure to

1. See Griffiths, Punitive Reclassification of Registrants Who Turn In Their Draft Cards, 1 SSLR 4001 (1968); Wills v. United States, 384 F.2d 943 (CA9 1967) (failure of board to send Form 304 until after sending new notice of classification was error, but could be cured by court considering registrant's classification *de novo* without deference to administrative action).

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perform an affirmative duty relating to the local board's capacity to keep in touch with the registrant and keep him properly classified, such as the duty to report changes of address or status. While the delinquency regulations have been used to penalize those who have committed some past transgression of the Act or regulations, it has been persuasively argued that their use in this manner is impermissible. Properly viewed, it has been argued, the delinquency regulations are analogous to civil contempt, and should be used only to compel compliance with some legitimate need of the local board which imposes delinquency status.[2] Adherence to the "civil contempt" view of delinquency would prohibit the use of delinquency status as a means of punishing registrants for past acts which they could in no way repair or undo, or for misconduct not directly related to the capacity of a local board to perform its classification function.

2. Griffiths, *supra* note 1. A similar view of delinquency has been taken by officials of the Executive Branch. *Id.* at 4009-10, quoting letters from Fred Vinson, Assistant Attorney General, and Presidential Assistant Joseph Califano, to the effect that delinquency should not be used to punsih "transgressions" against the Selective Service laws, but rather to enforce compliance with duties required by the law and regulations.

¶ 1100. Delinquency — Reclassification, Appeal, Reopening

The board may not reclassify a registrant I-A, I-O, or I-A-O as a delinquent unless it has complied with the provisions of R1642.4, relating to sending Form 304, and placing a copy in the registrant's file. Thereafter, the board "may," according to R1642.12, reclassify registrant who is within the age group liable to service (that is, not V-A) I-A, I-A-O or I-O, except that any registrant who is eligible for Class IV-A on the basis of service in the armed forces may be so reclassified only upon the instructions of the Director of Selective Service.[1] This seemingly almost absolute provision for reclassification is subject to some interpretive modification. The Justice Department, through the Solicitor General, has said that it must be construed in harmony with the provisions of the Act prescribing mandatory deferment and exemption of certain classes of registrants. Thus, if a registrant is in Class IV-D on the basis of his attendance at a divinity school, the board may not deprive him of his statutory right to this classification by using the delinquency regulations to punsih him.[2] While the Justice Dpeartment has not expressed itself upon other statutorily-based classifications than IV-D, the rationale of its position encompasses all classifications which are guaranteed by statute, rather than merely authorized by the statute to be provided by administrative regulation.[3]

A delinquent reclassified to class I-A, I-A-O, or I-O has the same rights of personal appearance and appeal as any other registrant, including the right not to be inducted during the process of appeal. R1642.14. A registrant may also be removed from his delinquency status "at any time," which has the effect (if he is in a class available for service) of removing him from liability for priority induction. This right to removal from delinquency status subsists even after the issuance of an order to report for induction. R1642.14(b). Moreover, the regulations affirmatively provide that no registrant shall be inducted or ordered to report for civilian work if classified I-A, I-A-O or I-O based on delinquency status unless he has been declared delinquent in accordance with the notice provisions of R1642.4 and has not thereafter been removed from delinquency status. This regulation appears to establish a mandatory requirement that the board follow the procedure prescribed in R1642.4.[4]

1. This latter proviso does not seem to be authorized under the statute, and an attempt to classify as available and induct one who had fulfilled his statutory obligation would appear to be unauthorized. *See* note 2 and accompanying text.

2. Memorandum for the Respondents, Oestereich v. Selective Service System Local Board No. 11, No. 1246, October Term 1967, at 11-13, reprinted in part at 1 SSLR 3028 (1968). See Griffiths, *Some Notes, etc.*, 1 SSLR 4012.

3. Other statutorily-guaranteed classifications are I-A-O, I-O I-D, I-S, II-S (undergraduate statutory deferment), IV-A, IV-B, IV-C (in most cases), V-A. Also included would be some registrants in classes IV-F or I-Y based upon statutorily-provided physical and mental standards. The statutory basis for these classifications is discussed at ¶ 19 *supra*. The other classifications are provided for in the Act. but the President is merely "authorized" to allow for them. See *Kimball*, 1 SSLR 3058; *Turley*, 1 SSLR 3058.

4. *But see* Wills v. United States, 384 F.2d 943 (CA9 1967) (board error in not following R1642.4 held not prejudicial). Following the regulations is not a prerequisite to prosecution for a violation of the Act or regulations. R1642.2. Ward v. United States, 195 F.2d 441 (CA5 1952), *rev'd on other grounds*, 344 U.S. 924 (1953).

¶ 1101. Delinquency — The Delinquent Nonregistrant

A nonregistrant who is required to register shall be registered by the local board before which he appears, or before which he is brought, the latter apparently a provision for the person brought in by the civil authorities. If the local board determines that because of the late registration, the nonregistrant should be declared delinquent, he may be assigned a residence address within the registering board's jurisdiction.

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That board will then classify him in a class available for service in accordance with R1642.12. If the registering board does not determine that he should be declared a delinquent, then it must forward his materials to the proper board as outlined in ¶ 1010 *supra*. R1642.11.

¶ 1102. Delinquency -- Purging the Declared Delinquency

The regulations provide for purging of delinquency, although it is not clear that the board must permit the registrant to do so. A persuasive argument may be made that it must, for to permit the delinquency process to be completed to the point of induction against one who has cured the default which led to the delinquency declaration makes of delinquency a punishment for past misdeeds, and the local board an instrument of punishment.[1] This role the board is not procedurally equipped to fill, for it has no provision for the safeguards which customarily and constitutionally accompany the imposition of punishment.[2] The Selective Service System has taken the position that priority induction is appropriate as a punsihment for misdeeds.[3]

The registrant who receives a Form 304 should, if he desires to avoid the consequences of reclassification and induction, forthwith and by telegram contact his own local board. The regulations and Form 304 permit this and it is clearly preferable to contacting another local board, which the regulations and Form 304 also provide. R1642.21. When a delinquent is brought before or appears before another local board, the regulations require that board to notify the registrant's board that the registrant is before it and that "he will be inducted if it is satisfactory to his own local board." R1642.21(a). This procedure does not permit as full an opportunity to explain the delinquency as does a report to the registrant's own board.

The registrant who is already in a class available for service (I-A, I-A-O, or I-O), and who is declared delinquent should in his communication with his board bring up all possible arguments for his not being continued in delinquent status. Possible arguments include: He has not in fact committed the violation of which he is charged in the Form 304; the facts set out in the Form 304 are not sufficient to constitute a violation of the Act or regulations; even if the acts are a violation, the Act or regulation as applied to his case is unconstitutional. The registrant may also ask for clarification of the asserted causes for declaration of delinquency, since many boards state these in a fashion not calculated to inform the registrant of precisely what he should have done or not done. In addition to the registrant's communication, a letter from an attorney at this point may be very helpful; copies of this letter should be sent to the State Director and to the National Director, marked to the attention of the General Counsel.

If prior to the events giving rise to the delinquency notice, the registrant was not in a class available for service, and if he receives a Form 304 without an attendant notice of reclassification, he should take the same steps in order to secure his removal from delinquency status and to forestall his reclassification.

If prior to the events giving rise to the alleged delinquency, the registrant was not in a class available for service, and if his notice of delinquency accompanies, follows, or immediately procedes a notice of classification into a class available for service, the registrant should promptly and in writing – perhaps by telegram– ask for a personal appearance, which should hold up any order of induction until the appellate process is over.[4] R1642.14. For procedure on personal appearance, see ¶ 1079 *supra*. In addition to the procedures there set out, it will be the registrant's task to convince his board that it should not retain him in delinquency status.

1. See ¶ 1099 nn.1-2 *supra*.
2. Griffiths, *supra* ¶ 1099 note 1, at 4004-09. See Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1962).
3. Griffiths, *supra* ¶ 1099 note 1, at 4003, quoting Selective Service System, Legal Aspects of Selective Service 42 (1963).
4. It is of course error for the board to send out a notice of classification to a class available for service before, concurrent with, or immediately after sending a Form 304 and giving the registrant an opportunity to purge the delinquency. Griffiths, *supra* ¶ 1099 note 1. See also Wills v. United States, 384 F.2d 943 (CA9 1967) (error to send out notice of classification before sending Form 304).

¶ 1103. Delinquency -- Declared Delinquent Reporting to a Local Board Other than His Own

If a registrant reports to or is brought before a local board other than his own, the registrant's local board will be sent the inquiry mentioned in ¶ 1102 *supra*, R1642.21. The registrant should also present to his own board the reasons for not advising the board to which he has reported that he should be inducted. The following reasons may be given, where appropriate: 1. The registrant has not yet been classified in a class available for service, if this is the case. No registrant may be inducted who is not first classified I-A or I-A-O, R1631.7, 1642.13, and no registrant who is not first classified I-O may be ordered to report for civilian work. R1642.12. 2. All other reasons given in ¶ 1102 *supra*. Communications to the board in these circumstances should be by telegram, and communication with the persons mentioned in ¶ 1102 is also advisable. The participation of a lawyer may be helpful as well.

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A registrant not yet classified in a class available for service who is ordered so classified by his board in its response to the board to which he has reported then has the same personal appearance and appeal rights as other reclassified delinquents. R1642.14. When a registrant who is in class I-O appears before a local board other than his own, the board before which he appears will notify his local board of his appearance and that he will be ordered to perform civilian work as determined by the local board to which he has reported, if that is satisfactory to the registrant's local board. The registrant's local board must then determine whether that should be done. R1642.21(c). The registrant who wishes to object to this procedure should do so in the manner stated above.

When a registrant who is in Class I-A or I-A-O appears before a local board other than his own, the board before which he appears will notify his local board, which will then advise the local board before which he appears whether he is still delinquent and what should be done. R1642.21(a), (e). Again, communication with the registrant's own local board may obviate further difficulty by removing the delinquency or otherwise influencing the board's action.

The I-A or I-A-O registrant may be ordered to report for induction only by direction of his own local board and not by the local board before which he has been brought, unless he is transferred to the latter board by order of the Director. See R1642.21(b).

¶ 1104. Delinquency — Non-Declared Delinquents

Registrants who fail to report for induction, who refuse induction, or who fail to report for civilian work are automatically delinquent. They cannot, of course, purge themselves of delinquency other than by submitting to the outstanding order of the board, and none of the procedural rights concerning purging delinquency are normally available to them.[1] If a registrant who has failed to respond to a local board order for induction reports to a local board other than the board which issued the order, he will be delivered for induction by the local board to which he reports in the same manner as a man transferred for induction. R1642.21(b).

If a registrant who has failed to respond to a order to report for civilian work, the local board to which he reports will issue him written instructions on reporting to his employer. R1642.21(d).

1. However, the registrant in this posture should consider the application to him of United States v. Stafford, 389 F.2d 215 (CA2 1968). In *Stafford,* the registrant, who had been ordered to report for induction, appeared at the local board on the day set for his induction with a letter stating his conscientious objection to participation in war. The board was closed, so he gave the letter to an officer at the induction station, where he refused to submit to induction. The court of appeals held that the registrant was entitled to consideration of his CO claim, even though he did not present it until the day of induction and even though he presented it in a procedurally improper way. The court directed that the district court determine whether the local board rejected the claim solely on the ground of timeliness. If that were the case, the court of appeals held the indictment must be dismissed.

¶ 1105. Delinquency — Reporting Delinquents to the Justice Department

Every local board must report to the United States Attorney for the judicial district in which it is located, the name and other information concerning every registrant who has disobeyed an order to report for induction or order for transferred man to report for induction, issued by that board. The board may withhold sending the delinquency report for not more than thirty days while it tries to locate the delinquent and secure his compliance. R1642.41.

The board may report any other delinquent to the United States Attorney, but need not do so. R1642.41(a). This discretionary reporting takes place by letter, a copy of which must be placed in the file of each registrant reported.

The decision whether to prosecute a delinquent lies with the United States Attorney under the direction of the Justice Department. However, by a 1967 amendment, § 12(c) of the Act provides that if the Director requests the Justice Department to pursue a case, the Department must do so or report to the Armed Services Committees of the House and Senate the reason it has not done so.

The board's relation with the United States Attorney after it reports a delinquent is a continuing one: the board continues to provide the U.S. Attorney with additional facts and asks his advice about whether to induct the delinquent. R1642.42. While the case is in the hands of the United States Attorney, there is opportunity to discuss the case with an eye to staving off an indictment. See Part III of this Manual.

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¶ 1106. Delinquency -- Record of Delinquents

The local board keeps a list of all delinquent registrants, whether or not reported to the United States Attorney, and posts the current list four times per year. The board is encouraged to give wide dissemination to information concerning delinquencies. R1642.44. The State Director, using local board information, sends a list of delinquents to the Director four times each year. R1642.46.

¶ 1107. Delinquency -- Suspected Delinquents

When a local board suspects someone other than one of its own registrants of being delinquent, it has the duty to summon such person before it to gain more information. The board is directed to report one who is thus summoned to the United States Attorney unless it is "convinced" that he is not delinquent. R1642.41(c). This procedure is not often invoked.

M. Medical or Psychiatric Unfitness

¶ 1108. Medical or Psychiatric Unfitness -- Generally

Medical or psychiatric unfitness entitles the registrant to placement in Class I-Y or IV-F.[1] The standards for placement in these classes are determined by the Surgeon General of the Army, as provided in R1628.1, and published as Army Regulations. These regulations, AR 40-501, are printed in the *Statutes & Regulatory Material* section of SSLR. When a registrant who is in classes I-A, I-A-O or I-O claims to have one of the named disqualifying physical or mental conditions, or the board is of the opinion that he does, the board must grant a medical interview. R1628.2(a), (b). Failure to grant the interview is prejudicial error in the classification process. The list contains many defects which the average person would not think are disqualifying, but the armed forces have decided who they feel should be taken and who should not, and this decision should not be subject to question by the local board.[2] The list should be carefully scanned by every registrant.

The following paragraphs discuss the procedure for obtaining review of claimed disqualifying conditions.

1. A quite valuable guide to practice in this field is Franck, *Presenting Medical and Psychiatric Unfitness for Duty under the Draft Law,* 26 The Guild Practitioner 75 (1967), in a special issue of the Guild Practitioner available for $1 from P.O. Box 673, Berkeley, California 94701.

2. Franck points out than many defects which may be a basis for disqualification are of a variety commonly thought of as marginal. Especially is this so of neck and back conditions. "Yet," Franck notes, "such physical conditions can be very serious when a soldier is carrying 40, 50, or 60 pounds on his back, jumping from great heights, or climbing up things. Of course, it can be a very serious matter if there is danger that the back will go out in a combat situation, even for a short period of time." *Id.* at 75-76.

¶ 1109. Medical or Psychiatric Unfitness -- Initial Steps by Registrant and Lawyer

If the registrant believes he may have one of the conditions or defects set out in the Surgeon General's list, he should have a physical or mental examination by a private phsyician. The lawyer should discuss the case with the doctor beforehand, just as he would discuss a personal injury claim with a physician. The danger of bias against those seeking legitimate exemption from service is fairly great, and a discussion between lawyer and doctor should uncover such a bias if it exists.

If the medical examination should produce evidence of a disqualifying condition, the doctor should be asked to prepare a complete report of his findings. It is important to present the relevant evidence to the board early and forcefully. The armed forces examining center is too crowded and too busy a place at which first to raise a disqualification claim.

At this point, the lawyer or the registrant should write the board citing the medical interview regulations and the appropriate paragraph of the Surgeon General's list and asking for a medical interview. The board will then mail a Form 219, Order to Report for Medical Interview.[1] R1628.2(b). If it does not, the aid of the State Director should be sought at once. At the same time that it sends a Form 219, the board will enter the medical interview request on the registrant's cover sheet, and will prepare a Form DD 47 (Record of Induction) on which the findings as to the registrant's physical condition will be noted. R1628.4.

1. Franck reports that when he communicates, as an attorney, with the local board on medical claims, he receives replies from the State Director. This suggests that the local boards are forwarding his letters for assistance, so that two levels of the System are aware that the registrant is represented by counsel. Franck, *supra* ¶ 1108, note 1, at 77.

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¶ 1110. Medical or Psychiatric Unfitness — The Medical Interview

Unless the registrant is too ill to appear, R1628.2(c), he must attend the medical interview, which may be conducted by the medical advisor to the board, or if the board has no medical advisor, by the board itself. R1628.4(a), 1628.3. The medical advisor will be a physician, and he may exemine the registrant. Typically, however, he will not be a specialist and he is foreclosed by the regulations from performing laboratory or X-ray work. R1628.3. He may, however, receive reports of such work submitted by the registrant. *Id.* He should also be given a copy of, and asked to consider, the report of the registrant's examining physician. Obviously, the reputation of the examining physician will carry some weight. If the local board conducts the interview itself, the registrant should, if possible, bring his physician with him.

¶ 1111. Medical or Psychiatric Unfitness — The Board Decision

The local board has only two alternatives open to it once a medical interview has been granted. If it determines that the registrant has one of the disqualifying conditions, it must file one copy of the Record of Induction Form, containing its own findings or those of the medical advisor, in the registrant's file, and send two copies to the State Director, one for forwarding to the Army Surgeon General; then, it must review the registrant's classification to see if he can be placed in some class other than I-A, I-A-O or I-O, without having to rule on the medical claim; then, it must cancel any order to report for armed forces physical examination; finally, it must note on the physical examination list, Form 225, if the registrant's name is thereon, that he has been found not qualified. R1628.4(d). If, on the other hand, the Board determines that the registrant does not have a disqualifying condition, or if it has any doubt in the matter, it must order him to report for an armed forces physical examination. R1628.4(e).

At the examination center, the registrant should carry with him copies of medical information which he wants to present to the examining doctor. He should insist upon keeping this material with him and not give it up except to the proper physician.

If the examination results in an adverse finding, the registrant and his attorney may write to The Surgeon, U.S. Army Recruiting Command, Hampton, Va., setting forth the facts of his case and asking for a new physical examination or a statement that he is medically disqualified. If an unfavorable reply is received, the registrant should write The Chief, Physical Standards Division, Department of the Army, Office of the Surgeon General, Washington, D.C. 20315. He may also write to the medical advisor to the State Director, and to the Director. This may produce results in the form of a new medical interview or new physical examination.

An adverse decision on a medical claim, assuming it is made in the normal manner with a request for reopening and issuance of a new notice of classification continuing the registrant in a class available for service, may be redressed through normal Selective Service appeal processes. The registrant may, that is, take an appeal to the appeal board. Generally; this procedure is not as efficacious as proceeding through Army channels.

¶ 1111.1. Medical or Psychiatric Unfitness — Psychiatric Problems

Psychiatric problems are like other medical problems except that the board has even less ability to deal with them than with medical problems of a non-psychiatric character. Further, and more important, it may be that a psychiatric report, if made a part of the registrant's file and shown to him, will either damage him psychically or interfere with his later chances of obtaining some position for which there are emotional stability qualifications and for which the applicant must release the information in his file.[1] In this event, the attorney can write and ask that the psychiatric report be shown only to competent medical personnel for them to make a recommendation to the board. Practitioners who have attempted this course report that the boards in question have responded with appointment of a psychiatrist who has recommended that the registrant be classified I-Y or IV-F.[2]

In any case, psychiatric claims are the most difficult to present at the examining station and should be documented and pressed as early as possible.

1. Moreover, government agents may inspect the file if approval of the Director or State Director is obtained, R1606.32.

2. For this observation, SSLR is indebted to Peter Franck, *supra* ¶ 1108 note 1, at 78-79.

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¶ 1112. Medical or Psychiatric Unfitness –– Late Claims

The registrant ordered to report for a preinduction physical examination who has a medical claim should press the board to permit him to present his medical evidence in a medical interview before the physical. If this fails, he should take his documentation to the examination with him and insist upon giving it to the proper doctor.

If the registrant has been ordered to report for induction and has a medical claim, he should seek the aid of the State Director and Director, and of the Army officials listed in ¶ 1111, *supra*, in obtaining a review of his condition.

¶ 1113. Medical or Psychiatric Unfitness –– Transfer of Medical Interview

If a registrant is so far from his own local board that attendance at a medical interview there would be a hardship he may, upon receipt of the order to report for medical interview, file with the local board for the area where he is at the time an application for transfer of the interview to that board. The transfer is automatic, and the procedure is set out at R1628.5.

N. Armed Forces Physical –– Medical, Mental, Moral, Loyalty Qualifications

¶ 1114. Armed Forces Physical –– Call for Physical

Physical examinations are conducted at armed forces examining and induction stations. The conduct of these stations is vested in the armed forces, and the Selective Service System plays only the role of delivering registrants to the station and of filling out the various forms reporting the acceptability or nonacceptability of the registrant.

The State Director periodically issues calls for physical examination stating the date and place of physical examinations and asking the board to forward a given number of registrants. R1628.11(a). The board in turn forwards those in Classes I-A, I-A-O and I-O roughly in the order in which they would be called for service, and without regard to pending personal appearance requests or appeals. R1628.11(b). The board may forward those not in a class available for service whose induction may shortly occur, and anyone else designated by the Director or State Director. R1628.11(c).

A registrant is notified of his physical examination by an order to report for physical examination, Form 223, compliance with which is a duty required to be performed under the Selective Service law.

Based upon the examination at the examining and induction station, the board acquires information which may be a basis for classifying the registrant I-Y or IV-F, and is enabled to determine his acceptability for military service. AR 601-270 provides that the physical examination must be given within one year immediately preceding induction. After one year has elapsed, the registrant must be given another complete physical examination before he may be inducted.

The procedure followed at Armed Forces Examining and Entrance Stations (AFEES), with respect to physical and mental examinations, is set out in detail in AR 601-270, the complete text of which is reproduced in SSLR's *Statutes & Regulatory Material* section.

¶ 1115. Armed Forces Physical –– Postponement and Transfer

Issuance of a Form 223, or forwarding a registrant under it, may be postponed in the same manner as a Notice to Report for Induction (Form 252). ¶ 1124 *infra*.

A registrant who is so far from his own board that compliance with the physical examination requirements would be a hardship may request transfer of his physical to the local board having jurisdiction over the area where he is. R1628.14. He should go to the nearest local board and request Form 230, which is an application for transfer with space at the bottom for the local board to note its approval or disapproval of the transfer. On the Form the registrant should note the reason for his absence from his local board area. The board has the power to decide his reason is not "good" and to deny the transfer. Reasons such as attendance at school, new residence and employment are generally sufficient.

The registrant will then return the form to his local board, which will note its action and send the form back to the registrant. The registrant should then await the action of the transferee board, which will send

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him a new order to report for physical. If the registrant is in one and his local board is in another of the following, transfer is automatic: continental United States, Alaska, Hawaii, Puerto Rico, Virgin Islands, Guam, and Canal Zone. R1628.14(d). A physical may be given abroad as well, LBM 69. The local board, when it grants the request for transfer, will forward to the transferee board one copy of Form 230, a DD Form 47 Record of Induction for noting of the results of the examination, any other information which the armed services should consider and any other records designated by the Director. R1628.14. The registrant who has been pursuing a claim for disqualification on physical or mental grounds should call the board's attention to this provision and ask the board to forward material from his file bearing on his request. The examination of a registrant who has been transferred proceeds in the same manner as in the case of any other registrant, and the various forms and other papers filled out by the examining station authorities are forwarded through the transferee board to his own local board for filing.

The Director may order transfer of the physical of any individual registrant or specified group of registrants. He who has been denied a transfer and wishes to obtain review apparently has this procedure open to him. R1628.15.

¶ 1116. Armed Forces Physical –– Procedure for Examination

The registrants who show up at their board for the physical will be transported to the examining station for examination en masse.[1] The procedure, see R1628.17, is not relevant to this manual except in some few matters of detail. The registrant's duty is not only to show up for the physical but to complete it, and to obey the reasonable orders of the armed forces personnel in charge of the station. R1628.17(f). See LBM 14.[2]

1. Except that a registrant who shows up for his physical and who is clearly disqualified on physical grounds shall not be sent. R1628.17(b).

2. *See* United States v. Collura, 139 F.2d 345 (CA2 1943) (refusal of vaccination); United States v. Carson, 1 SSLR 3046 (E.D. Ark. 1968) (objection to vaccination and to use of force entitled registrant to I-O classification).

¶ 1117. Armed Forces Physical –– Security Questionnaire

At the station, the registrant will be asked to complete a Family History Questionnaire, DD Form 398, which contains a series of questions on association with certain allegedly subversive groups. The form is reprinted in SSLR's *Statutes & Regulatory Material* section. If the registrant declines to complete this section of the form, he will be given a longer form on the same subject, DD 98. He may be given the DD 98 anyway, at the same time as the DD 398. Every inductee must complete a DD 98 form, or have one offered to him to complete.

A registrant need not answer the questions on DD 98, or the security questions on DD 398. While his unwarranted refusal to do so might be regarded as failure to complete his physical examination, there is no case on point. Since the Army regulations discussed below do not require completion of the form, but merely require that it be tendered and that an investigation be undertaken if it is not completed, the registrant who refuses to complete the form is arguably in the same position as the registrant who refuses to sign his registration card when he registers at 18. See ¶ 1007 *et seq.*. It is wisest, however, for the registrant who will not fill out these forms to rest his refusal upon the self-incrimination provision of the Fifth Amendment. See AR 601-270, Appendix IV.

Having refused to fill out the form, or having qualified his answers to the questions on it, or having answered other than negatively to all the questions, the registrant will be interviewed by military intelligence officers. He need not, and should not idly decide to, talk with them.

The procedure thereafter is governed by Army regulations, AR 604-10, reprinted in SSLR's *Statutes & Regulatory Material* section. See also AR 601-270, Appendix IV. Section III, paragraph 18 of AR 604-10, requires that an investigation be undertaken. A registrant "who qualifies DD Form 98 and/or DD Form 398, . . . or on whom the Department of the Army has derogatory information will not be inducted until action under Section IV and V has been taken." *Id.*. Sections IV and V provide for detailed investigative procedures.

Compliance with the Army's own regulations may not be prerequisite to induction of the registrant,[1] and lately the Army has been wont to omit the AR 604-10 investigation. However, where the political background of the registrant poses a danger that he will be inducted and then discharged other than honorably for preinduction activities, the investigation should be, and has been successfully by practitioners, insisted

1. *See* United States v. Brooks, 1 SSLR 3066 (M.D. Tenn. 1968).

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upon. The registrant's attorney should write, setting forth the facts, to: Army Intelligence Corps Command, Department of the Army, Washington, D.C. 20310. The Supreme Court has forbidden discharge based on preinduction activity when the Army might have investigated and obviated the induction in the first place.[2]

2. Harmon v. Brucker, 355 U.S. 579 (1957).

¶ 1118. Armed Forces Physical –– Moral Standards[1]

Registrants with convictions on their records, other than for minor traffic offenses, will be screened by Defense Department officials to determine "moral suitability" for military service. The screening process uses criteria of decision not unlike those customarily used in any probation-granting or other behavior-predicting process. In addition, the registrant will be asked if he is presently in custody for an offense. If he is even in technical custody, he is ineligible for service. Technical custody includes, but is not limited to, held to answer for a pending charge, active probation, active parole, suspended sentence with conditions as yet unfulfilled. Technical custody does not include, under AR 601-270, unsupervised parole or probation or suspended sentence without conditions.

If the registrant falls within any of the categories listed in AR 601-270 as making him prima facie ineligible, he must be subjected to a "moral waiver" investigation. This investigation is, in many cases, bypassed or short-circuited, and the tendency during times of high draft calls is for the moral waiver regulations to be relaxed so that fewer registrants are disqualified. For example, 1967 changes in AR 601-270 broadened the list of summarily "waivable offenses." See Appendix 28, AR 601-270, SSLR 2297.

If the registrant is dissatisfied with the moral waiver procedure followed in his case, complaints should be made to The Commanding General, U.S. Army Recruiting Command, Hampton, Virginia 23360. If no satisfaction is there obtained, the registrant should write The Executive Agent for AFEES, Deputy Chief of Staff for Personnel, ATTN: PD, Department of the Army, Washington, D.C. 20310.

1. The "conditional waiver endorsement" provisions of Army Regulations are contained at AR 601-270. The probation and suspended sentence provisions mentioned in the text were amended in 1967 to expand the available body of inductable manpower. The regulations are reprinted in SSLR's *Statutes & Regulatory Material* section.

¶ 1119. Armed Forces Physical –– Required Records

The armed forces examining station will send to the local board certain records which are of crucial importance and the registrant should ensure that they are properly placed in his file. For all registrants these forms will include a DD 42 (Statement of Acceptability), one copy of which is placed in the registrant's file and the original of which is mailed to the registrant. Other forms which will be filed include the Record of Induction, DD Form 47, detailing certain medical findings, the Report of Medical Examination (Standard Form 88) and the Report of Medical History (Standard Form 89), and, in the case of one found acceptable, any X-ray films. R1628.25. The board will also place a symbol after the registrant's classification symbol, denoting his physical, mental and moral fitness. LBM 65.

¶ 1119.1. Armed Forces Physical –– Challenging Results

If the registrant feels himself to be physically or mentally disqualified, his avenue of challenge to the physical is that listed in ¶ 1111, *supra*. He should write to the Army officials there listed. Simultaneously, he should seek postponement of board action through the intercession of the State Director and the Director.

If the registrant feels himself to be politically disqualified, he should follow the procedure set out in ¶ 1117 *supra*.

If he feels himself to be "morally" disqualified, he should follow the procedure set out in ¶1118 *supra*.

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¶ 1120. Induction –– Generally

The determination of quotas for induction is a complex process, set out at Part 1631 of the regulations, R1631.1-.3. After determination of state quotas and local board quotas within each state, the board must select and deliver for induction the number of men specified in the call for induction issued by the Secretary of Defense, R1631.4, and channeled to the board through the Director, who sets state quotas, R1631.5, and each State Director, who sets board quotas, R1631.6. The call is met in either of two ways, depending upon whether or not it designates a "prime age group" for induction. R1631.4, 1631.7(b). The following discussion traces the path of the selectee from his order to report for induction until he is either inducted or refuses to step forward and submit to induction. Not considered in the following sections are questions such as the right to cancellation of an order to report for induction issued during the pendency of an appeal, which is dealt with in the discussion of appeals. The registrant who receives an order to report for induction and who does not wish to be inducted must think quickly and carefully of means to cancel or postpone the order. Reopening cancels the order; the State Director and Director may postpone the induction or order reopening; the order of call may not have been followed; and so forth. At this point, almost every section of Parts I and II of this *Manual* may be helpful. The discussion that follows will help only slightly, for it is confined to the technical details of induction procedure.

¶ 1121. Induction –– Order of Call –– Generally

Assuming that a call is levied without specification of age groups – the general practice – the board calls registrants for induction based upon a prescribed order. R1631.7(a). Failure of the board to follow the order of call invalidates the induction orders of those called out of turn.[1] Thus, it is highly important for a registrant to verify the order in which he should be called by examining board records. The order of call is as follows: delinquents; volunteers under 26; nonvolunteers between 19 and 26 (except those married before August 26, 1965 and living with their wives), oldest first; nonvolunteers between 19 and 26 married before August 26, 1965 and living with their wives, oldest first; nonvolunteers over 26, youngest first; and 18½ year olds. The details of the call procedure are set out in R1631.7(a). Generally, the board must mail a Statement of Acceptability (DD Form 62) to the registrant 21 days prior to the day fixed for his induction, see ¶ 1119 *supra*, and must mail the Order to Report for Induction (SSS Form 252) at least ten days before the day fixed for induction. R1631.7(a), 1632.1.

1. *E.g.*, United States v. Lybrand, 279 F. Supp. 74, 1 SSLR 3002 (E.D.N.Y. 1967) (order to report for civilian work); United States *ex rel.* Bayly v. Reckord, 51 F. Supp. 507 (D. Md. 1943).

¶ 1122. Induction –– Order of Call –– Age Group Calls –– Prime Age Group

If the call is by age groups, as provided in R1631.4, the board must select and deliver its quota according to the terms of the call. R1631.7(b). The regulations providing for calls by age group are difficult to comprehend, but apparently they provide for the following order of call: delinquents; volunteers under 26; and then persons in the designated age group, and registrants who have requested and received undergraduate student deferments under the 1967 Act and registrants previously deferred in Class I-S(C) after attaining the age of 19. The regulations thus do not provide for calling anyone other than those in the designated age group. That is, if a call is levied for 19-year-olds only, those who are 20, 21, and so on, will not be called under any circumstances for they have no place in the order of call by age groups. If there are too few 19-year-olds to meet manpower needs, a call will go out for 20-year-olds, and so on.

The "prime age group" basis for induction,[1] authorized by the Act (§§4(a), 5(a), 6(h)(1)), has the main effect of drafting (oldest first) within a narrower age-span than the current 19-26. If 19-year-olds were designated (as seems most likely), persons in that category would spend a year of maximum liability. Then they would graduate to the next higher level and would be subject to the risk of being drafted only if the entire pool of 19-year-olds following them were exhausted. Anyone who received a college I-S or II-S would be integrated into the pool, and would spend a year as a 19-year-old, and then graduate upward with his pool. Of course, since any random selection within the pool is forbidden by the Act, what in fact will happen (so long as draft calls are far lower than available manpower) is that those with birthdates at the beginning of the age group selected would all be drafted, and those with birthdays at the end would all be free. For

1. This paragraph is drawn from Griffiths, The Draft Law (1st ed. 1968).

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example, if a calendar year 19-year-old group were designated and the "call" came to local boards from the Secretary of Defense for persons in the 1948-birthdate age group (see Reg. 1631.3(c) for the definition of "age group"), January birthdates would be bad, December birthdates would be good. The President could initiate this form of selection at any time.

¶ 1123. Induction — Volunteers

Any registrant may volunteer for induction, provided he is between 18 and 26 (17-year-olds may volunteer with parental consent). R1630.1. The volunteer must be physically, mentally, and morally qualified for service, R1630.4(c), and must not be a person who would be classified II-A, II-D, III-A, or IV-B. R1630.4(a), (b). The procedure for volunteering is set out in Part 1630 of the regulations. See Act §4(c).

¶ 1124. Induction — Postponement of Induction

Extreme emergencies beyond the registrant's control entitle him to a postponement. In addition, the State Director may postpone the induction of one registered in his state, and the Director may postpone any induction. The Director or State Director may also postpone the issuance of an order to report for induction. R1632.2(a). And, no registrant will be forwarded for induction or physical on a religious holiday observed by his faith. LBM 2. Law students may obtain a postponement to take the bar examination. LBM 44. The issuance of a postponement of induction does not invalidate or cancel an order to report for induction. R1632.2(d). The postponement is good for the period specified in the Postponement of Induction (SSS Form 264) issued the registrant, or until cancelled by the issuing authority. R1632.2(a), (c).

The registrant whose induction is postponed must report on the postponement date without the issuance of a new order to report.

¶ 1125. Induction — Transfer for Induction

The details of transfer, set out in R1632.9 and R1632.10, are not as important as the available reasons. Any registrant who is so far from his own board that reporting there for induction would be a hardship may request a transfer by going to the nearest local board and filling out a Form 252, Transfer for Armed Forces Physical Examination or Induction. R1632.9(a), (b). The standards are the same, and the procedure is the same, as in a transfer of armed forces physical. ¶ 1115 *supra*. In addition, the Director of Selective Service may order transfer of any registrant or group of registrants to any local board he designates. R1632.10.

Why transfer induction? First, for convenience. But there may be special reasons in special cases. If a registrant has determined to refuse to submit to induction in order to secure review of his claims that the classification and induction process is somehow defective as applied to him, he may wish to refuse induction in a favorable venue.[1] If the venue of his choice has other connections with his life, so as to make it legitimate for him to transfer, there is no reason why he should not seek transfer.

1. The proper venue for a prosecution for refusal to submit to induction is generally the judicial district in which the refusal took place. *See* Part III of this Manual.

¶ 1126. Induction — Noncombatants

Noncombatants are considered in the order of call with combatants in filling quotas. They are sent to the induction center with those classified I-A, except that I-A-O's after induction will be assigned noncombatant duty. R1631.7; Act §6(j). Noncombatant duty is defined in LBM 32.

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¶ 1127. Induction -- Reporting and Submitting

A registrant who wishes to challenge the legality of the classification or induction process as applied to him should report for induction and take all the steps up to the step forward which puts him into the armed forces. By doing this, he will have exhausted his administrative remedies.[1]

On the appointed day, the registrant and other inductees are to report to their local boards for transportation to the induction center. See R1632.14-.16; LBM 30. They will be given last-minute instructions, a further medical inspection, records will be filled out and a swearing-in ceremony held. When the oath is administered and the step forward commanded, the registrant who complies is in the armed forces. If he does not comply, he is not in the armed forces.[2]

1. Estep v. United States 327 U.S. 114 (1946). While it has been claimed that the separation of the physical examination from the actual induction may change the *Estep* rule, courts have yet to so rule. *See* United States v. Wider, 119 F. Supp. 676 (E.D.N.Y. 1954).

2. *Id.* See Part III, *infra.* But if he puts on a uniform and takes up military duties, he may be held to have submitted to a "de facto" induction. *E.g.* United States *ex rel.* Seldner v. Melliss, 59 F. Supp. 682 (N.D.N.C. 1945).

¶ 1128. Induction -- Special Calls for Doctors, Dentists and Allied Medical Specialists

Section 5(a) of the Act provides that the President may provide for the selection or induction of persons qualified in needed medical, dental or allied specialist categories on requisition of the Secretary of Defense. Under the authority of this provision, special calls for induction may be made for persons in these specialties. R1631.4. When such a call is made, it is filled in accordance with the normal order of call provisions of R1631.7. See ¶ 14 *supra* on the commissioning as officers of doctors, dentists and allied medical specialists. Generally, one called in a special call under the authority of §5(a) will be given the opportunity to accept a commission and enter the armed forces as an officer. See ¶ 14 n.3 *supra.*

P. Alternative Service for Conscientious Objectors

¶ 1129. Order to Report for Civilian Work -- Generally

A registrant classified I-O will be called to perform civilian work no sooner than he would have been called for induction had he been classified I-A or I-A-O. R1631.20.[1] The procedure for selecting appropriate civilian work, and the means by which a registrant is ordered to perform the work selected, is discussed in the following paragraphs.

Volunteering for civilian work is discussed at ¶ 1048 *supra.*

1. *See* United States v. Lybrand, 279 F. Supp. 74, 1 SSLR 3002 (E.D.N.Y. 1967).

¶ 1130. Order to Report for Civilian Work -- Selecting the Work

Appropriate civilian work, as defined in R1660.1, is limited to governmental employment, R1660.1 (a)(1), and to employment by a nonprofit organization or corporation engaged in a charitable activity or in carrying out a program for the public health and welfare. R1660.1(a)(2). Except as limitedly provided in R1660.1(a)(2), a registrant may not be ordered to employment with a private employer, R1660.1(b), lest the constitutional command against denial of due process and peonage be infringed by using the power of government to conscript into private employ.[1] A registrant who has been mailed a Statement of Acceptability (DD Form 62), or who has refused to report for his physical and thereby waived his right to disqualification on grounds of physical or mental unfitness, must within ten days submit three types of civilian work for the board's consideration. R1660.20(a).[2] If the board finds the types, or any of them, acceptable, it will

1. *Compare* United States v. Copeland, 126 F. Supp. 734 (D. Conn. 1954) (conscription into private employment unconstitutional), *with* United States v. Hoepker, 223 F.2d 921 (CA7), *cert. denied.* 350 U.S. 841 (1957) (rejecting *Copeland*).

2. Except that no registrant shall be ordered to perform civilian work in the community in which he resides unless the board first finds that his performance of his work in his community would be in the national interest. Such a showing may be made by the registrant upon the basis of his particular skill and the needs of his community. For instance, a registrant living in an urban community may wish to demonstrate that skills and contacts which he has acquired make him uniquely valuable to some ongoing project in that community. The showing is similar to that which a registrant would make in claiming a II-A classification based upon the pursuit of an essential activity.

One case holds that failure of a I-O registrant to report for his physical is grounds for making him a delinquent and ordering him to report for civilian work out of turn. The result seems ill-considered. United States v. Dicks, 392 F.2d 524 (CA4 1968).

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mail the registrant an order to perform civilian work, subject to the "order of call" proviso mentioned in ¶ 1128. If the registrant fails to submit the three types of work, or if the board finds the submitted types unacceptable, the board must propose alternatives. R1660.20(b). If the registrant agrees to perform any one of the three types of work proposed by the board, he will be ordered to perform it, subject to the order of call provisions mentioned in ¶ 1128. R1660.20(b).

If the registrant does not agree to perform any of the types of work proposed by the board, the regulations provide for the State Director or his representative to meet with the registrant and the board to seek agreement on the type of work to be performed by the registrant. If no agreement results, the board may order the registrant to perform a type of work designated by it, with the approval, however, of the Director. The board must hold a formal meeting and decide to order the registrant to the civilian work approved by the Director.[3]

In September 1968, LBM 64, which deals in detail with the selection and performance of alternative civilian service, underwent substantial revision. Paragraph 1, "Appropriate Civilian Work," provides that the work is to be of the sort set our in R1660.1, discussed *supra*, that it should when possible be performed out of the community in which the registrant resides, and that the position should be one which cannot readily be filled from the labor market. Added in September 1968 is a provision that the work should constitute "a disruption of the registrant's normal way of life somewhat comparable to the disruption of a registrant who is inducted into the armed forces." This language, which has no basis in the Act or regulations, has not yet been the subject of judicial challenge or interpretation. It would, arguably, be error for the board to rely upon it, for it does not have the force of law. See ¶¶ 31-33 *supra*.[4]

Paragraph 2, "Volunteering for Civilian Work," was greatly expanded in the September 1968 revision of LBM 64. Briefly, this paragraph restates R1660.1, relating to volunteering for civilian work, and provides that a registrant must volunteer for such work at his own local board, but if he is so far from his own local board that it would be a hardship to report there personally, he may go to the nearest local board which will assist him in volunteering through his own board. Paras. 2(a), 2(b), 2(f), LBM 64. Paras. 2(c) through 2(e) deal with the case of a registrant who is not yet classified or who is classified in a class other than I-O (and has not been issued an order to report for induction) who files a Form 151, volunteering for civilian work. Such a registrant is to be given the Form 151, and a Form 150, if he has not already filed one. The board will then proceed to consider the claim for conscientious objection, and will mail the registrant a Notice of Classification informing him of its action. The provision for mailing a Notice of Classification to a registrant not in Class I-O arguably requires the board to reopen the classification of such a registrant, particularly when read in conjunction with LBM 41. See 1 SSLR 22 ; ¶ 1048 *supra*.[5]

Paragraph 3 was unchanged in the September 1968 revision of LBM 64. It deals merely with physical examinations of I-O registrants. See ¶ 1114-19.1 *supra*. Paragraph 4, "Determination of Type of Civilian Work," was not changed in the September 1968 revision of LBM 64. These provisions restate in detail the steps set out in R1660.20 and discussed *supra*.

Paragraph 5, "Approval of Order to Civilian Work by Director of Selective Service," as amended in September 1968, sets out in detail the manner in which the approval of the Director of Selective Service is to be obtained for an order to report for civilian work in a case in which the board and the registrant have not agreed on the work to be performed. The board must send the registrant's selective service file to the Director with a request for approval of a particular work assignment. The Director will respond with a letter approving the work assignment (LBM 64, para. 5(c) reads "when the Director approves;" no express provision is made for disapproval). The September 1968 amendment of LBM 64 includes, in para. 5(c), an important statement of Selective Service policy concerning so-called "approved civilian work:" "There are no 'official' lists of 'approved employers . . . Congress has provided in section 6(j) that the local board shall determine . . . the work a I-O registrant is to perform. A local board is encouraged, however, to seek advice concerning prospective employers from the State Director . . . or from the Director. . . ." See ¶ 35 n.1 *supra*, on the power of the State Director.

Paragraph 6. Order to Report for Civilain Work. This paragraph sets out the method for issuance of the civilian work order, Form 153, and is unchanged in the September 1968 revision. ¶ 1128 *supra*. Paragraph 7. Correction of Procedural Errors. This paragraph, unchanged in the September 1968 amendment of LBM 64, provides that in the event of an error in processing a I-O registrant, the board must correct the error and resume processing from that point. Paragraphs 8-10, which were not significantly amended in the September 1968 revision of LBM 64, deal with transfer of registrants from one assignment to another and with processing of registrants who fail or refuse to report for or remain in civilian work. See ¶¶ 2426-42 *infra*. Paragraph

3. Brede v. United States, 1 SSLR 3083 (CA9 1968); LBM 64.

4. In *United States v. Tichenor*, 1 SSLR 3250 (CA6 1968) the court held that an informal directive does not have the force of law. *Cf. McCoy v. United States*, 1 SSLR 3251 (CA5 1968).

5. In *Petersen v. Clark*, 1 SSLR 3241 (N.D.Calif. 1968), the Court held that filing of a Form 151 did not require reopening of the registrant's classification. *Petersen* was, however, decided before the amendment to LBM 64 referred to in the text. *Quaere*, whether the System must follow the "advisory" directives of LBM 64 and of its "policy," 1 SSLR 22. See *Service v. Dulles*, 354 U.S. 363 (1957); *Vitarelli v. Seaton*, 359 U.S. 535 (1959), holding that an agency must follow its own rules. See generally ¶¶ 31-33 *supra*.

11, "Delaying Order for College Students," also not amended, provides for a delay in issuance of the work order for a registrant who is a college student.

Paragraph 12. Release from Civilian Work. The September 1968 amendment to LBM 64 explains in detail the procedure for release of a registrant from civilian work. One September 1968 change, to para. 12(a), provides that in excercising his R1660.21(d) power to order early release of a registrant from civilian work, the Director will not give credit to a registrant for time spent in civilian work prior to his having been classified I-O.

¶ 1131. Order to Report for Civilian Work –– Reporting

When the process of finding appropriate work is completed, the registrant will be sent an order to report for civilian work, and may arrange with the local board to have his travel expenses paid so that he may report to his civilian employer. Failure to report as ordered is a violation of a duty under the Selective Service law and regulations. R1660.30. When a registrant fails to obey the board's order, his file will be forwarded to the Director of Selective Service for review. R1660.30. This procedure provides an opportunity for informal negotiations at the national level. See Part III of this Manual.

When the registrant reports, it is his duty to remain in the civilian employ to which he is assigned for 24 months, unless sooner transferred or released. R1660.21(c), (d).

A. Introduction

1. Scope Note

¶ 2001. Scope Note

This part of the *Practice Manual* (Part III) deals with the institution and defense of criminal prosecutions under the Military Selective Service Act of 1967. The defense of a criminal prosecution is the principal means for securing judicial review of alleged procedural error or misclassification by Selective Service boards. Therefore, this Part must be read in connection with the general discussion of the structure of Selective Service in Part I and the treatment in Part II of System administrative procedures and classification standards. Indeed, the vast majority of the cases cited in Parts I and II are criminal cases, in which a particular claim of illegal board action was considered.[1]

Because Parts I and II contain this extensive discussion, frequent reference will be made to discussions there, and this Part will principally concern itself with the procedural devices for raising claims of illegal board action.

This Part begins with a general discussion of the structure of a criminal case and the principal defenses which may be raised. Then, each offense defined by Section 12 of the Act is taken up and discussed and special problems relating to it are considered. For a more detailed analysis, see the analytical table of contents, beginning at SSLR 1001.

The use of criminal proceedings to punish noncompliance with the Act, and the rules, regulations and directions made under it, is to be distinguished from the use of delinquency proceedings by the local board to compel compliance with regulations and orders which are designed to aid it in the process of classification and induction of registrants. For a discussion of delinquency, see ¶¶ 1098-1107 *supra*, in Part II of the *Manual*.

The broad scope of this section of the *Manual* has required summary treatment of marginal issues, always a question of judgment. It has also dictated an uneasy detente between the full treatment of a problem of practice and a treatment only of the aspects of that problem uniquely relevant to selective service procedure. The latter aspect of every problem is touched, and the treatment beyond that has been dictated by a judgment of the usefulness of extended discussion. This judgment has been based on an assessment of the availability to the average practitioner of other reference works of more general application. Also, discussion has tended to be confined to precedents and materials available to the average practitioner in a moderately well-equipped library. In making judgments about inclusion of general discussion, it is assumed that the reader has access to an annotated code, either U.S.C.A. or F.C.A.; Federal Reporter, Federal Supplement, Federal Rules Decisions, and a Supreme Court service; a good manual of criminal practice;[2] and a legal encyclopedia (Am. Jur. 2d, for example).

1. For a discussion of judicial review by means of habeas corpus or affirmative civil litigation *see* Part IV of this *Manual*.
2. For example, Cipes' volume of Moore's *Federal Practice*, without peer as a one-volume reference work, or Orfield's multivolume work. *See also* Amsterdam, *et al.*, Trial Manual for the Defense of Criminal Cases (1967).

2. How Offenses Are Defined in Selective Service Law

¶ 2002. Definition of Offenses—Legislative History[1]

Under the 1917 Act, 40 Stat. 76, failure to perform a duty required under the Act, evading the Act's requirements and aiding others to do so were declared misdemeanors under Section 6. This section was rather like the present Section 12(a), although a good deal less complex. The section provided not only for punishment through the civil courts: Any person subject to military law who violated the section was to be tried by court martial. A similar provision exists in the present section 12, but the 1917 provision had considerably more practical meaning than its present day counterpart. Under the 1917 Act, a qualified male was considered a part of the military from and after the date stated in the order to report. If he failed to report, he was a "deserter," and could be tried by the military authorities.

Sections 12 and 13 of the 1917 Act provided for prosecution of those who dealt in liquor and prostitution near military camps, and provided for misdemeanor conviction for violators of regulations on these subjects to be issued by the Secretary of War.

1. For a discussion of the legislative history of conscription, *see* ¶2 *supra*. *See also* Smith, *Draft and Selective Service Acts* (1862-1967), SSLR 5022 (1968), a first-rate bibliography of legislative materials.

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Under the 1940 Act, 54 Stat. 885, a rewritten and expanded version of the 1917 section 6 was written in as Section 11. Section 11 is almost identical to the present-day section 12(a). Section 11 provided for a sentence of five years imprisonment and/or $10,000 fine for violation of its terms. It explicitly provided that no person was to be tried by court martial unless he had been "actually inducted" into the armed forces.[2] The 1940 Act, therefore, established in its penalty provisions as well as in its other sections, the line of demarcation between a nominally civilian executive agency (the Selective Service System) and the military establishment.

The 1948 Act, 62 Stat. 604, immediate precursor to the Universal Military Training and Service Act (1951), 65 Stat. 77, and the present Military Selective Service Act of 1967, 81 Stat. 100, added new penalty provisions. Its section 12(a) was virtually identical to Section 11 of the 1940 Act. But §12(b) created new offenses relating to forging, altering, and using for false identification certificates issued by the Selective Service System, such as registration certificates and notices of classification. See ¶ 2701 *infra.* With only minor amendments, § 12 of the 1948 Act has been carried forward into present law.

The text of the present § 12 is as follows:

"(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title, rules, regulations, or directions who shall knowingly make, or be a party to the making of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title, or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title, or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title unless such person has been actually inducted for the training and service prescribed under this title unless he is subject to trial by court martial under laws in force prior to the enactment of this title. Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall be advanced on the docket for immediate hearing, and an appeal from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

"(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title, or rules or regulations promulgated hereunder; or (2) who with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title, or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title, or rules and regulations pursuant thereto relating to the issuance,

2. For a discussion of the line of demarcation between induction and civilian status, *see* ¶ 1127 *supra.* There have been relatively few attempts since World War II to subject to military command and control those who indicate at the induction station their refusal to enter the military. The procedure for reporting and submitting has now been defined rather carefully. *See, e.g.,* Edwards v. United States, 1 SSLR 3100 (1968). The leading case on the 1940 Act provision is Billings v. Truesdell, 321 U.S. 542 (1944). *See also* United States v. Masaaki Kuwabara, 56 F. Supp. 716 (N.D. Calif. 1944); *cf.* Gilliam v. Reaves, 263 F. Supp. 378 (W.D. La. 1966).

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transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisioned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury.

"(c) the Department of Justice shall proceed as expeditiously as possible with a prosecution under this section, or with an appeal, upon the request of the Director of Selective Service or shall advise the House of Representatives and the Senate in writing the reasons for its failure to do so."

¶ 2003. Definition of Offenses—Statutory Definition

Some offenses, including all those in § 12(b), are defined explicitly in § 12, without reference to other parts of the Act,[1] or to the regulations or to commands issued by a local board.

These include the false statement, and interference with "the administration of this title" provisions of § 12(a). These provisions are self-executing in nature and require no further action by the System to be operative.

1. The "duty" to register and to keep one's board informed of one's current status, treated in §§ 3, 15(b), is dealt with in ¶ 2004 *infra*, as the questions raised are similar to those presented by the definition of offenses in terms of duties established by the regulations. *See also* ¶¶ 2501-04 (refusal to register); ¶¶ 2526-30 (failure to perform other duties).

¶ 2004. Definition of Offenses—Offenses Defined by Regulation

§ 12(a) provides, in part, that it is a crime to "knowingly fail or neglect to perform any duty required . . . under or in the execution of this title, or *rules, regulations* or directions made pursuant thereto."[1] The definition of these offenses requires resort to administrative regulations and proclamations. The duty to register was established by a series of Presidential proclamations beginning in 1948, see ¶ 1107 *supra*, and these proclamations will help establish whether a given male is or is not part of a class required to register.

Other offenses are defined by the regulations, 32 C.F.R. Part 1600 *et seq.*, reproduced in SSLR. The regulations, sometimes echoing statutory language, create a number of "duties," principally having to do with reporting changes of status and other information to the registrant's local board and other housekeeping matters. The test of determining whether a given regulatory definition of a "duty" is within the ambit of § 12 has not been the subject of extensive judicial inquiry. One court suggested, however, that whether or not neglect of a given duty is a criminal offense may be determined, on a case-by-case basis, from the language of the particular regulation claimed by the prosecution to create the duty.[2] The word "duty" need not be used, this court held. One commentator has taken issue with this position, arguing that either the word "duty" or the word "shall" must be used in order to create a "duty" cognizable in a criminal prosecution under § 12.[3] Thus, for example, R 1617.1, which states that every registrant "must" have his registration certificate in his personal possession, would not create such a duty, while § 1617.10, which is captioned "Duty of Registrant Separated from Active Duty in Armed Forces," and which provides that such persons "shall" obtain a new registration certificate, would do so. This interpretation of the regulations is supported by the literal language of § 12(a) and § 15(b). Section 12(a) provides for punishment of those who "fail or neglect or refuse to perform any *duty* required" by the Act or regulations. Section 15(b) provides that "it shall be the *duty* of every registrant" to keep his board informed of changes of status as provided by the regulations. The word "duty" also appears at a number of places in the regulations. For example, R 1628.16 makes it the duty of a registrant to report for his physical examination and R 1632.14 makes it his duty to report for induction. See ¶ 2005 *infra*.

This view of the "duty" provisions of § 12(a) also accords with elementary notions of procedural

1. Other references to "rules" and "regulations" appear in § 12 as well. Not included in ¶ 2004's discussion is a treatment of the reference to possession regulations in § 12(b)(6), a matter treated at ¶ 2777 *infra*. The formal and substantive validity of regulations is discussed at ¶¶ 31-32 *supra*.

2. United States v. Lembo, 76 F. Supp. 209 (E.D. Pa.), *rev'd on other grounds*, 170 F.2d 18 (CA3 1948). But in *Lembo* the regulation did use the word "shall", so the more expansive language of the court may perhaps be considered dictum. *Cf.* Mogall v. United States, 333 U.S. 424 (1948).

3. Dranitzke, *Possession of Registration Certificates and Notes of Classification by Selective Service Registrants*, 1 SSLR 4029 (1968), arguing that either "shall" or "duty" suffice to create a duty within § 12(a).

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fairness, for by insisting upon a talismanic phrase or form of words in order to create a criminal offense by means of the regulations, one would at the same moment provide a means of notifying the registrant of the consequences of his failure to abide by a particular regulatory command. Serious constitutional objections may be made to a system which leaves those subject to it guessing as to the nature and extent of their liability.[4] See also ¶¶ 2526-30 *infra* (performance of specific duties).

Other duties might be identified by reference to other forms issued by the Selective Service System, many of which contain directions concerning information that must be supplied to the System. R 1606.51 provides that all forms are made part of the regulations, and that every person is "charged with the duty" of obeying directions in forms.

In addition to the questions raised above concerning the interpretation of language in forms, there is a serious question whether § 1606.51 complies with the provisions of the Freedom of Information Act concerning publication of rules and regulations. See ¶ 31 *supra*. Most directions contained on Selective Service forms are not generally applicable regulatory directives, but rather individually-addressed commands. See ¶ 2005 *infra*.

4. The vice of vagueness has been most extensively treated in the first amendment context, and it is there that courts have spoken most clearly of the springes set for the unwary or even the conscientious by vague statutory and regulatory provisions. However, certain of these decisions state principles arguably broader than their facts. In Cramp v. Board of Public Instruction, 368 U.S. 278 (1961), the court struck down a loyalty oath required of, among others, teachers, upon the ground that the vagueness of the oath, which had to be subscribed under penalty of perjury, made it impossible for one conscientiously desiring to comply with the law to know what activities and associations were covered by the oath and which were not. He had therefore to risk a perjury prosecution if he signed or lose his job if he didn't. It is the uncertainty generated by the vagueness of the governing standard that is common to both the *Cramp* case and the definition of offenses by the regulations. This uncertainty, this undefinability, means that the question of what is a crime and what is not cannot be answered except on a case by case exercise of judgment, and therefore the rule of *Lembo, supra* note 2, unless limited to cases in which the regulation uses the word "shall", as in *Lembo*, is no different from a statute permitting a person to be punished for "misconduct", the definition of misconduct to be judged criminal or not at the whim of each particular jury. Such a statute was declared unconstitutional in Giaccio v. Pennsylvania, 382 U.S. 399 (1966). *See also* Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U.Pa.L. Rev. 67 (1960).

¶ 2005. Definition of Offenses—Definition by Board Order

The Act and regulations set out rules of general applicability. The making of regulations by the President and by the Director, ¶¶ 31-32 *supra*, is a "rulemaking" function. The system also exercises the "adjudicatory" function of sending out individually-addressed orders to provide information, appear at a given time and place to meet with the board, report for a physical examination, or report for induction or alternative service.

Violation of certain of these orders may result in prosecution under § 12(a). The regulations explicitly make it the "duty" of registrants to report as ordered for physical examination and induction. R 1628.16, R 1632.14. Furthermore, the orders to report may themselves contain statements that wilful disobedience subjects the offender to prosecution. See, *e.g.* Order to Report for Induction, SSLR 2156:22.

There are other board orders embodied in the various forms used by the System, and, violations of these orders may be the basis for prosecution. For example, the Classification Questionnaire, Form 100, reprinted at SSLR 2156:3, "shall" be filled out and returned by every registrant with ten days of the mailing date stamped on it. R 1621.10(a). There is dictum to the effect that failure to return such a questionnaire at all is a basis for prosecution under § 12(a).[1] This result is questionable, since the term "duty" is nowhere used in R 1621.10, or on Form 100 itself, and the regulations explicitly provide that the consequence of failure to return Form 100 is classification into Class I-A by the board. R 1622.1(c) On generally accepted principles of construction, this specific provision should override the general language of § 12(a).

Similar analysis might be made of other violations of local board commands claimed to be offenses under the act, but it should be underscored that while such analyses are useful as defenses to prosecutions, it would be risky to rely on them in advising registrants of their duties under the Act. Not only is any given theory subject to acceptance or rejection by the courts, but violation of board orders which cannot be enforced by means of criminal sanctions may nonetheless result in delinquency proceedings with attendant reclassification and priority induction or in the registrant being classified I-A for failing to provide information usable as a basis for deferment or exemption.

In any case, the attorney representing a registrant charged with failing to follow a "direction" of his local board should be alert to analyze the precise manner in which the government claims that a particular "direction" has acquired sufficient definiteness and importance that its violation should result in criminal prosecution.[2] See ¶¶ 2526-30 *infra*.

1. United States v. Haug, 150 F.2d 911 (CA2 1945), held that the defendant could not be convicted of failing to return the questionnaire because it had been misaddressed, but implies that but for that circumstance he might be convicted. *Cf.* Bagley v. United States, 136 F.2d 567 (CA5 1943).

2. *See* ¶ 2004 *supra* for a discussion of this problem in an analogous context.

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¶ 2051. The Selective Service Client—Ethical Problems

The selective service client, typically, is like few others. Usually, he is young, between 18 and 26, or perhaps just over 26. If his alleged violation grew out of a dispute over the fairness of board action, the right of the government to conscript him, or scruples about war or about a particular war, he may have deep-seated convictions about his role and the relationship of his prosecution to his beliefs. Often he is quite articulate.

The majority of selective service criminal trials are for refusal to submit to induction, and the defense of these cases is a means of testing the alleged illegality of local board action. The stringent limitations upon judicial review of selective service decisions require that many, and perhaps most, claims of illegality be raised by refusing to submit to induction and defense of a criminal prosecution. Although submitting to induction and seeking habeas corpus is also a means of securing judicial review, this method is often not available to the conscientious objector for whom submitting is contrary to his asserted opposition to war in any form, or to members of, for example, the Jehovah's Witness sect, for whom submitting betokens acknowledgement of a governmental authority which most Jehovah's Witnesses find objectionable on religious grounds. Affirmative litigation to secure preinduction review of board action is treated in Part IV of this *Manual.*

The "test case" character of much selective service litigation, the age and articulateness of the client, and the issues of principle often involved, affect tactical judgments throughout the course of selective service litigation.

The lawyer in a selective service case is also in a unique position because the law requires that in order to secure judicial review of selective service decisions, it is very often necessary that the client risk criminal prosecution in vindication of his interests, and that the lawyer advise him concerning the likelihood of institution of a criminal prosecution and of its success. While it has been held that a lawyer's counselling function is not unlawful, see ¶ 1004 *supra* and ¶ 2601-06 *infra,* no court has yet squarely confronted the lawyer's duty when a criminal prosecution under the Act is a possibility if his client relies upon his advice.[1] Each lawyer must scrutinize the facts of each case in light of Canons of Ethics 32 and 37. These canons should, however, be interpreted so as to reflect the contemporary view of litigation as a vehicle for vindicating claims to social justice.[2] It appears clear that a lawyer advising a client upon his rights under the System and of the means available to test them does not invite a prosecution or disciplinary proceeding which under existing law would be entitled to succeed. See ¶ 1004 *supra* and ¶¶ 2601-06 *infra.*

1. People v. Kresel, 243 App. Div. 137, 277 N.Y.S. 168 (1935). The most cogent of the legal realists upon the subject of skating close to the line of the law was Mr. Justice Holmes. *See, e.g.,* Superior Oil Co. v. Mississippi, 280 U.S. 390, 395-96 (1930); United States v. Wurzbach, 280 U.S. 396, 399 (1930). *See also* Canon of Professional Ethics 16. A discussion of "counseling" as a criminal offense under § 12 of the Military Selective Service Act occurs at ¶¶ 2601-06 *infra.* This discussion treats the question taken up in fuller detail and broader context.

2. *E.g.,* NAACP v. Button, 371 U.S. 415 (1963).

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¶ 2101. Facts Giving Rise to the Charge—Initial Government Response—Conversations with Government Agents

In the majority of selective service cases, the facts giving rise to the charge occur openly and without concealment on the part of the registrant or other defendant. Exceptions to this occur most often in fraud, forgery and false identification cases arising under § 12(b) of the Act, and in some refusal to register or refusal to report cases in which the registrant or those charged with assisting him in his violation seek to avoid contact with the Selective Service System by subterfuge or emigration.

Often in refusal to submit to induction or refusal to perform alternative service cases, the attorney will be called in advance of the consummation of the alleged offense. If so, his job is to structure the facts and direct the course of events to seek administrative relief and to maximize the chances of success in any resulting litigation. This counseling function is treated in Parts I and II of the *Manual.*

In other cases as well, particularly those connected with acts of protest or resistance to the draft or to American foreign policy, the attorney may be consulted concerning the legality of particular acts or the chances of success in a "test case" about particular protest activity, in light of the first amendment guarantee of free speech and the terms of the Act. In such a case, the attorney must decide his role in relationship to the proposed protest activity. See ¶ 2051 nn. 1-2 and accompanying text.

In addition, the attorney can give preoffense advice concerning the probable response of the government to particular acts by his client. In any case brought to him prior to initial contact with government agents, this role is also worthwhile to play. Above all, the client should be counseled concerning his right not to make a statement to government agents and the probable consequences of making such statements. Events have shown that even articulate and perceptive persons, fully aware of their rights and of the consequences of giving statements to government agents, wind up saying things they wish they had not said.[1] Moreover, the problem is compounded by the agent's taking down those statements and testifying to them before grand and petit juries in criminal cases. Typically, the FBI conducts investigations in selective service cases. The agent interviews the subject and takes notes in the form of a question and answer dialogue. He then dictates a report of the interview which becomes a part of FBI files and is made available to the Justice Department for use in the prosecution of any case that may be brought.[2] The memory, perception veracity and bias of the FBI agent are all important in the transmutation of the statement from its initial form (as it falls from the lips of the subject) to its rendering in the form of testimony by the agent in court.[3] Of course, all prior statements of the defendant are admissible, if relevant to the charge. And out-of-court statements by third persons may be admissible as well, under exceptions to the hearsay rule.[4]

The client should be advised, absent compelling circumstances, not to make statements to government agents. Typically, the opportunity to make such statements comes just after a refusal to submit to induction (AR 601-270 para. 40(c)(1), SSLR 2245, requires AFEES officials to seek a statement from every induction refuser) or in the wake of an act of protest during the investigative phase of a case. The client in such a situation may feel--as a psychological matter--that talking to the FBI is a logical extension of his act. It is this feeling which must be combatted by reference to the practical effect of making statements. Of course, the client may have conscientious scruples which lead him to talk with the agent, but he should at least be informed of the possible adverse consequences.[5]

1. A study by a Yale professor and student documented this statement in the context of a specific FBI series of interviews in connection with a draft offense – a draft card turn-in. Griffiths & Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protesters,* 77 Yale L.J. 300 (1967).

2. The process of taking statements, reducing them to writing and using them in court is described to some extent in Jencks v. United States, 353 U.S. 657 (1957), and its progeny, Palermo v. United States, 360 U.S. 343 (1959), Rosenberg v. United States, 360 U.S. 367 (1959), and Campbell v. United States, 373 U.S. 487 (1963).

3. Some check upon variations between the interview report and the trial testimony of the agent is provided by the provisions for discovering the defendant's prior statements, *see* ¶ 2206 *infra,* Rule 16(a)(1), F.R.Crim.P., and by the rule that the agent's report must, if relevant, be produced after he has testified, Jencks v. United States, *supra* note 2, 18 U.S.C. § 3500 (Jencks Act). However, it is reported that since the *Jencks* decision and the Jencks Act, the practice of agents is to destroy their handwritten interview notes. *See* ¶ 2260 *infra.*

4. Under, for example, the declaration against interest or statement of intention exceptions. *See* United States v. Annunziato, 293 F.2d 373 (CA2), *cert. denied,* 368 U.S. 919 (1961).

5. If he does decide to talk to the government agent, he should be aware of the possible penalty for making false statements. *See* 18 U.S.C. § 1001, construed in Friedman v. United States, 374 F.2d 363 (CA8 1967), as not making punishable a false report of police brutality made to an FBI agent, and 18 U.S.C. § 1510, an obstruction of justice provision added in 1967 by 81 Stat. 362, and as yet undefined in scope.

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¶2102. Interviewing the Client

Every lawyer should develop a Client Interview Form for use in his practice of selective service law. Good starts on such a form can be found in many legal publications but no form will fully meet the requirements of any lawyer unless he develops it himself. See ¶1002 *supra.*

The form should contain, in addition to the name and address of the client, all relevant background and family information, and a detailed account of the client's personal history. As an adjunct to the information-gathering process, in any case in which the client's selective service history is or may be relevant, a complete copy of the selective service file should be obtained. This may be done by securing an authorization from the registrant, in writing, for the attorney to inspect the file. R1606.32(a)(1). With that authorization, the attorney can write or visit the board and ask that a copy of the file be made. See 1 SSLR 16 (1968) ("Obtaining copy of Registrant's Selective Service File"). An indicted registrant may secure a copy of this file free of charge. See 1 SSLR 19 (1968).

The interview should also dwell extensively upon the client's sensibilities and beliefs, and in most cases a thorough discussion of the client's views about selective service and war may be in order. The purpose of such a discussion is not only to acquaint the attorney and client one with another. but to provide a framework within which the attorney and the client can define their respective roles in the impending litigation. Many registrants have quite definite views on the steps which they are willing to take to vindicate their claims in court. For example, many of them will wish to eschew "technical" defenses and concentrate upon issues of conscience or of constitutional magnitude. The attorney must decide whether he is willing to take the case knowing that he will be thus handicapped in his work. If he is willing, he may be advised to set out the conversation in the form of a memorandum, to protect himself in the event of later question about the competency of his representation in the handling of the case.

At the initial interview the question of a fee should be raised and discussed. Legal defense organizations, legal aid agencies, and other groups do not charge fees, and the client's obligation for expenses, if any, and the agency's legal or policy guidelines on clients and fees should be spelled out clearly. The practice of most private attornees is to take fee-paying cases on the same basis as other criminal matters, and to accept non-fee cases in accord with their own sense of professional responsibility. If the case is to be a "paying" case, the arrangements for paying the fee should be carefully and fully worked out, to obviate later misunderstanding. Lawyers in criminal cases frequently find it useful to take a retainer in advance which is big enough to cover most of the anticipated fee in the case.

¶2103. Finding the Facts

In addition to the client interview, the following sources of information should be used:

1. Client's selective service file. See ¶2206 *infra.*

2. Interviews with witnesses suggested by client. Depending upon the nature of the case, witnesses will be able to identify the sources and basis for the client's deferment claim, if the case involves such a claim. Into this category would fall the minister, welfare agency sources, physician, family and friends. In a case involving an act of protest, witnesses from among any group that saw the events in question should be carefully questioned.

3. Informal discussion with police agencies and the prosecutor. See ¶2104 *infra.* Whether or not negotiation as suggested in ¶2104 is successful in settling the case, the view of the government and its version of the essential facts is important to understand.

4. Newspapers and magazines. Many selective service cases generate publicity. The newspaper or magazine story may be a helpful source of information, and the reporter who wrote the story a good witness. Often, particularly in selective service protests or war protests leading to alleged violations of the selective service laws, the only persons who are available to testify are police or other government representatives, members of the demonstrating group, and reporters. A sympathetic and perceptive reporter is a good neutral witness, and his notes may provide additional leads for they will usually be more complete than the published story.

Third party sources are, in the initial stages, more valuable than an interview with the client. The lawyer is usually best advised to find out the facts as perceived by others than the client before beginning to build a theory of the case. The client should not be tied down to a story in conversation with the lawyer until the lawyer has built an acquaintance with the facts sufficient to enable him to assist the client in reconstructing his recollection. It is embarrassing for both lawyer and client for the former to pump a detailed account of events out of the latter, whose memory is impaired by the passage of time, the presence of a real interest in the outcome of events, and sometimes an attack of "I-wish-I'd-said-that," only to have the story contradicted at many places by the objective record or the memory of disinterested third parties.

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¶ 2104. Preindictment Negotiations

An important and often overlooked step in the criminal process is preindictment negotiation with the prosecutor and others. After the facts giving rise to a possible selective service prosecution have taken place, there is a greater or lesser amount of time before the government takes any formal action such as seeking an indictment or filing a complaint to obtain a warrant for the defendant's arrest. Even if the case begins with an arrest without warrant, at the induction center or elsewhere, the period between the release of the defendant on bond, after F.R.Crim.P. 5, and the time when an indictment would be returned--often a matter of a couple of months or more--provides opportunity for negotiation.

Negotiation can go on at many levels. The first and most obvious place to begin is with the Selective Service System, a tack suitable in cases involving refusal of induction, refusal to report for civilian work, and kindred offenses. The State Director has the power to order a registrant's classification reopened after issuance of an induction order, ¶ 40 *supra*, and this power does not terminate when the registrant refuses to submit to induction. The National Director has the same power. ¶ 37 *supra*. If the client's conduct was based upon the contention that he was entitled to some other classification than the one he received, this power can be invoked even after the offense of refusal is consummated. Technically, the offense being complete, a prosecution may be undertaken. But as a practical matter, it is usually possible to avert it if the defendant brings himself into compliance with the Selective Service laws after favorable board action on his classification. If the offense is refusal of induction or civilian work and the defendant is ready to comply, as he was not when he refused, negotiations with the State Director and Director should look to having induction or reporting for civilian work rescheduled. LBM 14 requires that the cover sheets of registrants who have claimed ministerial or conscientious objector status be forwarded to the State Director for review prior to the initiation of a prosecution. This review procedure provides a means for negotiation with the State Director and the Director.

Failing in this endeavor with Selective Service officials, or in the absence of it, the prosecutorial agencies should be turned to. It may be in a given case that all avenues of appeal and negotiation within the Selective Service System were exhausted prior to the defendant's allegedly criminal conduct, or the nature of the case may dictate that resort to the System is inappropriate. Cases in the latter class include those involving false statements, counseling evasion or refusal of registration of service and the like, and of course any case in which the client is not a selective service registrant.

The statutory and practical structure of a selective service prosecution is reasonably well-defined. The Director of Selective Service has the power, granted in the 1967 amendments to the Act, to direct in writing that a particular prosecution be undertaken by the Justice Department. The Department must comply with the request or explain to the Armed Services Committees of the House of Representatives and Senate why it has not done so. § 12(c). General Lewis B. Hershey, the Director of Selective Service, has stated in an interview that he has not used that power (as of Spring 1968). In the Department of Justice itself, Selective Service cases are handled specially. In December 1967, a Selective Service unit was created within the Administrative Regulations Division of the Department, and the head of the unit took responsibility for the Department's Selective Service criminal cases. In addition, the Civil and Criminal Divisions may be called upon where appropriate. Referral of cases to the United States Attorney is dealt with at ¶ 1105 *supra*.

At another level entirely, the United States Attorney in each federal judicial district has a fair degree of autonomy. While he cannot prevent a prosecution being brought (as the Department of Justice can always send a Special Assistant Attorney General to present a matter to a local federal grand jury), he can bring cases despite Department of Justice disapproval. As a practical matter, there is extensive informal discussion between the Department and the United States Attorneys, although a routine selective service case will receive only routine Department approval, if that. In judicial districts which have a large amount of Selective Service litigation, one or more assistant United States Attorneys (AUSA's) may be assigned principal responsibility for handling cases in this field. Moreover, early contact with the AUSA can avert arrest of the registrant on a complaint sworn out by the FBI.

In invoking the aid of all elements of this prosecutorial system, care must be taken not to trespass upon lines of authority which the Department and the United States Attorney have set up, lest offended sensibilities endanger negotiations.

If there is an Assistant United States Attorney to whom the case will eventually be assigned, it is a good idea to approach him first. If not, then the U.S. Attorney's office will be able to tell the attorney which AUSA is presenting matters to the grand jury. An alternative approach is to seek an appointment with the United States Attorney directly, or with an Assistant in a senior position.

In the initial discussion, the lawyer should make the prosecution aware of his view of the case, and point up some problems which the government might have in pursuing the case to a successful conclusion. Also to be mentioned are facts about the case and the defendant which would make the prosecutor look

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upon it with more than usual interest or concern. (It is, of course, important not to spell out the theory of the defense in an excess of zeal to explain one's position.)

If the object of negotiation is to sidetrack the prosecution to let the defendant go into the Army, then perhaps discussion at the United States Attorney level is all that need be done. However, if the object is to prevent an indictment by convincing the government the case is not worth bringing, then discussions will usually be necessary with the head of the Selective Service unit at the Department of Justice in Washington, or with his superior, the head of the Administrative Regulations section of the Department.

These officials should be called just before or just after the initial meeting at the local level. They will generally decline to discuss the case until the United States Attorney's office draws them into it. However, it does no harm to explain the facts as the lawyer and the client see them, and to point up reasons why the case should not be brought. The contact should, if possible, be by telephone rather than letter.

Among the points to be made in negotiation in many selective service cases are: procedural infirmities in the classification process, substantive board error, lack of harm to the System as a result of the defendant's alleged conduct, and policy implications of the prosecution.

The object of the process, in the end, is to provoke a three-way dialogue between the prosecutor at the local level, the Department of Justice in Washington, and the attorney, looking toward a disposition of the case.

Among the technical details to keep in mind are those relating to the return of an indictment or the arrest of the defendant during negotiation. The local prosecutorial official should be asked to ensure that no procedural steps are taken in the case while the negotiations are going on. He should also be assured, if the attorney can in good faith make the assurance, that the defendant will appear as required and that there is no need to embarrass him by issuing an arrest warrant or a bench warrant upon the indictment if one is returned. See F.R.Crim.P. 4 (arrest warrant), 5 (warrant on indictment).

An incidental benefit of the negotiation process should be to determine the theory of the government's case, and the strong and weak points in it.

It should be noted however, that negotiations may in some cases be inadvisable. If the only result of negotiation is to give the government a chance to tell the local board how to clean up its errors and issue a new induction order, and if the client is determined to refuse induction, it may be better to let the case go to trial.

¶2105. The Grand Jury

Selective Service violations are felonies and must be prosecuted by indictment. The indictment is returned by a federal grand jury of 23 persons governed by F.R.Crim.P. 6, and selected in accordance with 28 U.S.C. §§ 1861-70.[1] The independence of the grand jury from the prosecutor is more theoretical than real, and as a practical matter the grand jury votes an indictment when, and only when, the prosecutor recommends it. Typically, also, the case presented to the grand jury is extremely sketchy, perhaps consisting only of the testimony of one government agent.[2] Thus, the opportunity to use the grand jury to benefit a defendant is narrowly limited, although the grand jury may be used to disadvantage him.

A principal means by which a potential defendant may be disadvantaged, although it is a tactic used less and less frequently of late, is calling him before the grand jury and subjecting him to prejudicial and hostile questioning. Since by federal rule the grand jury meets in secret and since by rule and settled practice the witness may not have his lawyer in the grand jury room,[3] the dangers of calling the defendant are obvious.

1. These sections were amended by P.L. 90-274, the Jury Selection and Service Act of 1968, approved March 27, 1968, to take effect December 22, 1968. This Act broadens the base for jury selection, and makes a number of changes in jury selection procedure designed to make procedures uniform in all the judicial districts. It does not apply to indictments returned and petit jury panels convened prior to its effective date. On jury selection, *see* ¶2204 *infra.*

2. This procedure has been approved by the Supreme Court. *See* Costello v. United States, 350 U.S. 359 (1956), holding that presentation of a case to the grand jury entirely by means of the hearsay testimony of a government agent is not a violation of due process or an unauthorized usurpation of the grand jury's function. Exceptions to the broad rule of *Costello* may, however, be recognized. One may be contained in Brady v. United States, 24 F.2d 405, 407 (CA8 1928). *Brady* held that an indictment could not be procured with hearsay alone, a proposition set at rest by *Costello.* However, *Brady* also held that:

> "It is the settled law of this circuit, we think, that an indictment will be quashed, where there . . . was no evidence whatever." 24 F.2d at 407.

This latter proposition retains its vitality, it would appear, and would apply to a situation in which the grand jury heard no rationally persuasive evidence of one or more elements of the offense. *See* Burton, J., concurring in *Costello,* 350 U.S. at 364. Moreover, the rule of *Costello* may be on the wane. The Second Circuit said in dictum in United States v. Umans, 368 F.2d 725, 730 (CA2 1966), *cert. dismissed,* 389 U.S. 80 (1967):

> "[W]e think it not amiss for us to state that excessive use of hearsay in the presentation of government cases to grand juries tends to destroy the historical function of grand juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecution that grand juries are supposed to afford the innocent."

See also Justice Field's charge to the grand jury, 2 Sawy. 667, quoted in *Ex parte* Bain, 121 U.S. 1, 10-11 (1887); Hale v. Henkel, 201 U.S. 43, 63 (1906).

3. Where the witness is a prospective defendant, there may be an exception. *See* Sheridan v. Garrison, 273 F. Supp. 673 (E.D. La. 1967), holding, on the ground, among others, that it appeared he would be denied the right to counsel, that a state grand jury could not call a witness who was a prospective defendant.

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However, there has come into being some law to indicate that a prospective defendant should not be called before a grand jury in any case, and if he is, that certain safeguards are necessary to prevent denial of fundamental procedural rights. If a prospective selective service defendant is called before the grand jury, and it is decided that he should not testify, his attorney should write the United States Attorney, stating that he represents the subpoenaed person, that there is reason to believe that his client is a prospective defendant, and that he has advised his client to invoke his privilege against self-incrimination before the grand jury. Further, counsel may wish to demand that he be permitted to accompany the client into the grand jury room, and to state that if this request is denied, the client has been advised to decline to answer questions upon the further ground that his sixth amendment right to counsel is being violated. Finally, the letter should point out that in light of the facts it sets forth, calling the client can serve only to prejudice him in the eyes of the grand jury.[4]

If the United States Attorney persists, the client should be instructed to answer no questions other than his name, to read out a prepared refusal to answer, and to ask to leave the grand jury room to consult with counsel whenever he feels that there is some difficulty. Counsel has the right to remain in the grand jury anteroom to be available for such advice.

Calling a prospective defendant under circumstances which might tend to his prejudice may be ground affirmative action to quash the grand jury subpoena.[5] However, the point is probably best saved and used in a motion to dismiss the indictment.

There may, on the other hand, be cases in which the attorney will want to have his client testify before the grand jury. Since such a decision is a serious one to make, it is perhaps wise to underscore its principal danger--the prosecution is given free rein to examine the client under oath with a court reporter present and thereby to gain considerable information concerning the case. Given the prosecutor's control over the grand jury, sending the defendant in will be of little use in the vast majority of cases. However, in litigation involving basic issues of procedural fairness, or in a refusal of induction case in which the principal questions at trial will turn upon an anaylsis of the defendant's selective service file, and the good faith of the defendant is important, a voluntary grand jury appearance by the defendant may serve to help convince the trial judge of the defendant's sincerity. Finally, there is the possibility, probably remote, that the grand jury will return a "no bill" and refuse thereby to indict. Many selective service registrants and other potential defendants are articulate enough and sensible enough to withstand a grand jury appearance. Such an appearance should be made only after the most careful preparation by counsel, asking questions with which the client will almost certainly be faced in the grand jury room.

If the decision is made to have the client appear, and he has not been subpoenaed, the lawyer should request of the United States Attorney that he be called. If he is not called in response to the request, this fact may be used in a motion to dismiss the indictment. There is no reported case of such a motion having been made, but its theory would rest upon such cases as *Russell v. United States,*[6] dealing with the importance of an independent grand jury in safeguarding against unwarranted prosecution, and therefore supportive of the defendant's right to seek to persuade the jurors not to indict. When the client appears, he should be prepared to insist upon discussing aspects of his case favorable to him. In a refusal of induction case, for example, he may wish to take in with him extracts from his selective service file, to show that local board error was committed in his case.

Finally, the grand jury may be used creatively by the defense counsel's insisting that witnesses favorable to the defense be called. The same dangers of exposing the theory of the defense case are present.

4. *See* Jones and Short v. United States, 342 F.2d 863 (CADC 1964); United States v. DiGrazia, 213 F. Supp. 232 (N.D. Ill. 1963); Sheridan v. Garrison, *supra* note 3. These cases form the beginning of a developing body of law on the limits of prosecutorial discretion in calling grand jury witnesses. *Cf.* United States v. Luxenberg, 374 F.2d 241 (CA6 1967), perhaps distinguishable as the defendants there were not "prospective defendants" at the time of their grand jury appearance. Detailed discussion of them is beyond the scope of this *Manual.*

5. Sheridan v. Garrison, *supra* note 3; United States v. DiGrazia, *supra* note 4.

6. 369 U.S. 749, 770 (1963). For a discussion of the *Russel* holding on the grand jury's function, *see* ¶2202 *infra. See also* Stirone v. United States, 361 U.S. 212, 218 (1960).

¶2106. The Indictment

In some judicial districts, selective service cases are commenced with the return of an indictment. The alternative procedure under the Federal Rules of Criminal Procedure, through filing of a complaint, arrest of the defendant and the holding of a preliminary examination to determine if there is probable cause to hold him to answer, is used in other districts. If it is, then that procedure is handled as in any federal criminal case,[1] and the preliminary examination is a good place to discover the prosecution's evidence. On rare

1. *See* F.R.Crim.P. 4, 5, 40, the last named dealing with an arrest in a district other than that in which the alleged crime took place. (In several jurisdictions, notably the Southern District of New York, Colorado, and Alaska, refusers of induction are arrested without complaint at the induction center.)

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occasions, the attorney may be advised to put in defense evidence at the preliminary examination in an effort to have the case thrown out by the United States commissioner. However, this is usually an idle gesture, because the commissioner's action does not preclude the prosecutor from seeking and obtaining an indictment.

The procedure when an indictment is returned varies depending upon what arrangement counsel has made with the prosecutor and depending upon where the defendant is at the time. It is preferable for the attorney to reach an agreement with the U.S. Attorney to surrender his client if and when an indictment is returned. The client will then be summonsed rather than arrested. F.R.Crim.P. 9(a). If the defendant is arrested, the procedure varies depending upon where the arrest takes place. The procedure for arrest in the district in which the indictment is returned is set out in F.R.Crim.P. 9, that for arrest in a "nearby" (within 100 miles) district in Rule 40(a), and that for arrest in a distant district in Rule 40(b). In the event of the defendant's arrest upon a warrant in a distant district, in a case in which an indictment has been returned,[2] the removal hearing before the judge or commissioner will address itself to whether the defendant is the person named in the indictment, F.R.Crim.P. 40(b)(3), and possibly to questions of venue as well.[3]

The procedure upon arrest without a warrant is described in F.R.Crim.P. 40(b)(4).

2. When an indictment has not been returned, the hearing addresses itself to the question of probable cause. F.R.Crim.P. 40(b).

3. On use of the removal proceeding to raise questions of venue in selective service cases, *see* the lengthy opinion in United States v. Chiarito, 69 F. Supp. 317 (D. Ore. 1946). On the merits, the *Chiarito* venue decision must be read in light of the Supreme Court's subsequent decision in Johnston v. United States, 351 U.S. 215 (1956). *See* ¶¶ 2211, 2405, 2428, 2453, 2478 *infra,* all dealing with aspects of venue choice.

¶ 2107. Bail

Bail in federal criminal cases is governed by F.R.Crim.P. 46, Bail Reform Act of 1966, 18 U.S.C. §§ 3146-50, and the eighth amendment. Together these provisions entitle every defendant in a noncapital case to be released.[1]

The first step in obtaining bail is contacting the United States Attorney. In most cases, he will agree to a bail that can easily be met and there will be no need to do more than move in an open court or before the commissioner for bail and have the government's consent recorded, after which the granting of bail on the terms agreed is usually a matter of routine. The attorney's own willingness to vouch for the reliability of the client may be important in securing government consent to low bail.

If a motion for bail must be made, it is initially addressed to the judge or commissioner in accordance with the provisions of 18 U.S.C. § 3146. 18 U.S.C. § 3146 establishes a preference for release of a defendant on his own recognizance or upon execution of an unsecured appearance bond (a simple promise to pay), and provides that only if the judge or commissioner is affirmatively satisfied that release on own recognizance will not assure the presence of the defendant may he impose other conditions of release. 18 U.S.C. § 3146(a).

First to be explored among these are obviously nonfinancial conditions, since many selective service defendants are impecunious. Custody release, providing for release in the care of an organization or responsible individual, may be dictated. § 3146(a)(1). If custody release is not acceptable to the court, then perhaps cash bond may be set with a provision that the defendant need post only 8 or 10 per cent of the amount of the bond. § 3146(a)(3). Least desirable, it appears, are conditions involving restriction on the defendant's abode, association and movement, § 3146(a)(2), or involving part-time custody, § 3146(a)(5).

The Bail Reform Act provides for special review of the conditions of release, and for a special appeal procedure. 18 U.S.C. § 3146(d), 3147.

Finally, 18 U.S.C. § 3150 makes bail-jumping a felony in felony cases.

1. F.R.Crim.P. 46(a)(1). 8 Moore, Federal Practice ch. 46 (Cipes ed. – Criminal Rules).

2. *Arraignment and Plea*

¶ 2108. Arraignment and Plea—Appointment of Counsel

The arraignment is the first formal post-indictment appearance of the defendant in court to answer the charge against him. He is given a copy of the indictment. F.R.Crim.P. 10. If he has no counsel, counsel is appointed for him. F.R.Crim.P. 44.[1] He is called upon to plead to the charge. F.R.Crim.P. 11. Unless a guilty plea has been negotiated beforehand, his plea should be not guilty. It can always be changed if that is later determined to be advisable.

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At the arraignment, counsel should ask for sufficient time to prepare and file pretrial motions. F.R. Crim.P. 12(b)(3) provides that counsel must file motions prior to the plea, but that the court may grant a "reasonable" extension. Motions addressed to the face of the indictment and to the jurisdiction of the court both of which are nonwaivable grounds of objection to the charge, may be made at any time. F.R.Crim.P. 12(b)(2). See ¶ 2201 *infra.* The practice varies from court to court, but generally prosecutors will consent to thirty to sixty days for motions. On the importance of motions practice in selective service cases, see ¶ 2201 *infra.*

1. Under the Criminal Justice Act, 18 U.S.C. § 3006A, each judicial district must put into effect a plan for representation of indigent defendants. Appointed counsel may, under the Act, receive compensation for their services and be reimbursed for expenses. Even if a defendant does not have appointed counsel, he may use the other provisions of the Act relating to transcript, and investigative, expert and other services. § 3006A(e). With regard to appointment of counsel, lawyers in at least one judicial district have set up Selective Service Lawyers Panels, and have secured the agreement of the chief judge of the district to appoint counsel for selective service defendants from the Panel membership. *See* 1 SSLR 4. Where such a panel does not exist, it may be possible to convince the court that counsel experienced and interested in selective service matters should be appointed.

¶ 2109. Plea--Not Guilty

As mentioned above, a plea of not guilty is advised. It is usually unwise to offer to plead guilty early in the case. Selective Service offenses are different from other crimes, in that there are no misdemeanors to break the charge down to. It is a felony or nothing, and pleas of guilty cannot be taken lightly. The best device is to plead not guilty and then continue the process of negotiation and preparation for trial. For example, a good set of pretrial motions may turn out to provide a bargaining point for dismissal of the charge.

¶ 2110. Plea--Guilty or Nolo Contendere--Generally

A plea of guilty must be accepted by the court and will not "automatically" result in a judgment of conviction, although, of course, conviction is the almost invariable consequence of a guilty plea. F.R.Crim. P. 11. A plea of nolo contendere need not be accepted by the trial court, F.R.Crim.P. 11, and will usually not be accepted unless the government consents to it.[1]

Many attorneys and many defendants prefer a nolo plea because of the psychological impact of pleading "guilty." It seems somehow better merely to say that one does not contest the facts. In a selective service case, where feelings of conscientious scruple are often at the center of the defendant's (and the court's) concern, this desire on the defendant's part may be an unusual circumstances justifying acceptance of a nolo plea by the court. A discussion of the nolo plea appears in *United States v. Harker.*[2]

1. On the effects of the nolo plea, the details of entering it, and the difficulty of obtaining government consent, *see* 8 Moore, Federal Practice ¶ 11.07 (Cipes ed. – Criminal Rules). *See also* cases in which a nolo plea was accepted, *e.g.,* United States v. Kennedy, 1 SSLR 3178 (1968). Other such cases will be collected and reported in SSLR, and the current index should be consulted.

2. 1 SSLR 3181 (1968).

¶ 2111. Plea--Plea Bargaining[1]

As stated at ¶ 2109 *supra,* there are no misdemeanors into which a selective service case can be resolved. A two or three count indictment may be reduced to one count, but this is usually an empty gesture by the prosecution because only in very few jurisdictions are consecutive sentences given in selective service cases.

Theretore, the object of most plea bargaining is dismissal, if that is possible. See ¶ 2104 *supra.* But assuming that dismissal has been ruled out, or assuming that the client wishes to plead guilty as a matter of conscientious scruple, the following suggestions are designed to assist in plea bargaining.

1. In many jurisdictions, pleas of guilty may be made to a judge of the defendant's choice. Sometimes the determination of which judge is to accept the plea is a matter of calendar scheduling and the attorney should insist upon his choice even if it means delay of the case in order for that to happen. Although there has been some criticism of "judge-shopping," it is regarded by many as a legitimate means of clearing up the criminal docket. There can be no hard and fast suggestions about which judge to choose, except that it may be possible to arrive at a decision through examination of judges' actions in sentencing selective service law

1. Plea bargaining is another of those subjects cutting across the whole of federal criminal law. Excellent discussions of it occur in the Cipes volume of Moore. 8 Moore, Federal Practice ¶ 11.05 (Cipes ed. – Criminal Rules); Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence,* 66 Yale L.J. 204 (1956).

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violators. There will obviously be judges whose reputation and public posture provide a warning to counsel.

2. In a few jurisdictions, the prosecution makes or will agree to make recommendations on sentencing, and it is possible to discuss the matter of possible sentence with the prosecution prior to the plea.

3. Whether or not the prosecutor makes recommendations, some judges may be willing to at least indicate their position on the matter of sentence prior to entry of a plea. The practice varies widely from judge to judge, and an experienced attorney in the district should always be consulted on this score.

4. In some jurisdictions, it may be possible to inquire into typical presentence report practices in selective service cases. The attorney may be able to determine whether certain probation officers are better than others in draft cases, or whether there is a general hostility to draft law defendants. This may help in arriving at a decision as to plea, and may also help determine which probation officer the attorney should try to secure for the presentence report. See ¶ 2271 *infra.*

¶ 2112. Transfer of Case from the District for Plea and Sentence––F.R.Crim.P. 20

F.R.Crim.P. 20 provides that a defendant arrested or held in a judicial district upon charges arising in another judicial district may, with the written consent of the United States Attorneys for both districts, waive trial and transfer his case, for purposes of pleading guilty or nolo contendere, to the district where he is arrested or held.

Rule 20(a) deals with the case in which an indictment is pending against the defendant and he is arrested or held in connection with it. Rule 20(b) permits transfer though no indictment has yet been returned, and requires only that a warrant have been issued upon complaint in the transferor district. Upon the return of the indictment and the filing of the consent to transfer by the defendant and the United States Attorney, the case is transferred as under Rule 20(a).

Rule 20 thus permits a defendant to forum-shop for a favorable court before which to plead guilty or nolo contendere. It is important to note that the choice of transferee forum need not be made by virtue of the defendant adventitiously being arrested in one district or another. In the typical selective service case, the defendant will have some idea that a charge against him may be filed. As soon as possible, counsel should contact the United States Attorney for the district in which the charge may be returned, and will no doubt have done so to pursue the negotiations suggested at ¶¶ 2104, 2110-11 *supra.* If it is decided that the client should plead guilty or nolo contendere, the discussions should include assurances by the United States Attorney for the transferor district that counsel will be notified when a warrant is issued, or an indictment returned (if the case is a "grand jury original" not to be pursued by means of a complaint and warrant, see ¶ 2106 supra). When the warrant or indictment is issued, the defendant may be surrendered to the United States commissioner in the appropriate district and proceedings undertaken to secure his transfer.

The transfer is applied for upon a standard form in use by most United States Commissioners, or by the defendant signing a statement that he understands the charge against him, that he desires to plead guilty or nolo contendere and to waive trial in the transferor district, and that he wishes to plead in the transferee district. This form of statement conditionally (conditional, that is, upon his own continued desire to plead guilty or nolo contendere) waives his right to a trial, and to having that trial conducted in the "state and district wherein the crime shall have been committed," as guaranteed by the sixth amendment.

Should negotiations in the transferee district break down, or should the defendant and his counsel decide that standing trial is preferable to pleading guilty, Rule 20(c) provides for automatic retransfer. If at any time after transfer the defendant pleads not guilty, the cause is sent back to the transferor district and the defendant's statement that he wished to plead guilty or nolo contendere may not be used against him. F.R.Crim.P. 20(c). Of course, if the defendant has already pleaded guilty or nolo contendere, he is subject to the same restriction on withdrawal of that plea as in any other case.

Obviously, Rule 20 provides a valuable right for the defendant who wishes to plead. Often, refusals to report for or submit to induction or to report for civilian work take place, in the law's contemplation, at places far distant from a defendant's home, or in a district known for giving harsh sentences in draft cases. See ¶¶ 2211, 2405. 2428. 2453, 2478, 2528, 2553 *infra.* The defendant may quite properly wish to have his sentence determined in the community in which he lives or works or in which he has a reputation which might favorably impress the court.

Whether the consent of the United States Attorney for either locality might be withheld if it were clear that the transfer was merely a "forum-shopping" device on the part of a defendant who had no colorable contact with the transferee district is debatable. The closest analogy is perhaps in F.R.Crim.P. 23(a), which requires the consent of the United States Attorney before a trial by jury may be waived. In *Singer v. United States,*[1] the Supreme Court indicated that the consent could not be unreasonably withheld. In the context of Rule 20, "reasonableness" might turn upon such arguably objective factors as the contact of

1. 380 U.S. 24 (1965).

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the defendant with the community into which he seeks to transfer. Significantly, however, the Advisory Committee on Criminal Rules mentioned no such limitation upon transfer,[2] and the rule seems designed principally to save judicial and court official time and to prevent inconvenience and expense to the defendant in getting from one forum to another. This view of the rule suggests that transfer could be appropriately denied only if the defendant had clearly sought to obtain a favorable forum by travelling a long distance to a district where he had no "logical" reason to go.

2. The Notes are reprinted in the U.S.C.A. edition of the Rules.

3. *Pretrial Motions*

¶ 2201. Pretrial Motions Generally

The practice in federal courts is to make pretrial motions after a defendant has pleaded to the indictment.[1] Local rules may determine when motions are to be made, or the aid of the court may be invoked to obtain a reasonable time to prepare and file motions.

The importance of filing written pretrial motions dealing with every aspect of the case which can be reached without trial of the general issue cannot be overemphasized. In addition to their value in gaining the point about which that motion is made, pretrial motions may serve to show the strength of the defense case and thereby assist in negotiations. Moreover, all defenses and objections which can be raised by motion must be raised before trial or they are considered waived.[2] Exceptions to this rule are objections based upon the failure of the indictment to state an offense and the lack of jurisdiction of the court. F.R.Crim.P. 12(b)(2).[3] In addition, the rigor of the rule is relaxed by the rule permitting an appellate court to notice plain error[4] and by the practical considerations arising in the trial of the case. For example, an objection to the indictment or to the theory of the government's case may be made by an objection to the introduction of particular items of evidence at trial, or by motion for judgment of acquittal at the close of the government's case.

This consideration leads to an admonition against spelling out in pretrial motions theories of the defense case which might lead the prosecution to seek a superceding indictment curing its initial errors. Generally, it is better to reserve to the time of trial case-winning procedural or substantive defenses which can effectively be raised in the course of the trial. At trial, they may be raised by means of a motion for judgment of acquital, the granting of which concludes the case, jeopardy having attached.[5]

The tactical question of timing claims is influenced by four objective facts: First, the waiver provisions of Rule 12 which require early presentation of some claims; second, the prohibition against placing the defendant twice in jeopardy, which counsels deferral of some claims until trial; third, the limitation in 18 U.S.C. § 3731 upon the government's right to take an appeal, which operates in some cases to complement double jeopardy provisions;[6] and fourth, the uncertain extent to which even after a successful defense of a selective service case involving refusal of induction the board may reorder the defendant to report, which leads counsel to choose a course which will minimize this possibility. See ¶ 8.1 *supra* for a full discussion of this problem.

The paragraphs below, ¶¶ 2202-13, describes the pretrial motions which ought generally to be made in a selective service case. The determination which of them to make and the scope of each in a particular proceeding must be made on a case-by-case basis, taking into account the discussion of particular pretrial motions in this *Manual* in connection with the treatment of particular offenses.

1. F.R.Crim.P. 12(b)(3) requires pretrial motions to be made at the time of the plea unless the court permits them to be made within a reasonable time thereafter. Since arraignment and plea are usually held together, a motion for time within which to file motions is generally made at the time of arraignment. Counsel for the defense and the government are usually able to agree on a time for motions. Failure to make a motion for time within which to file motions may be cured upon a showing of excusable neglect. F.R. Crim.P. 45(b)(2). Generally on the subject of pretrial motions *see* 8 Moore, Federal Practice ch. 12 (Cipes ed. – Criminal Rules).

2. F.R.Crim.P. 12(b)(2). Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963) (delay in presenting grand jury challenge). A defendant may raise by motion any matter susceptible to determination without trial of the general issue. F.R.Crim.P. 12(b)(1). He *must* raise all such matters except those specifically listed in Rule 12(b)(2). The combined effect of these provisions is to require the defense to figure out what "general issue" means. In practice, motions prior to trial are generally procedural in character, matters of guilt or innocence being deferred until trial. *See* Moore, *supra* note 1, at ¶ 12.03. *Compare* United States v. Madrid, — F. Supp. —, 1 SSLR 3168 (W.D. Tex. 1968).

3. "Jurisdiction" means jurisdiction of the subject matter, not of the defendant's person. *See* United States v. Rosenberg, 195 F.2d 583, 603 (CA2), *cert. denied,* 344 U.S. 838 (1952). *But see* 8 Moore, Federal Practice ¶ 12.03[2] n.10 (Cipes ed. – Criminal Rules).

4. F.R.Crim.P. 52(b).

5. Generally, jeopardy attaches when the jury is impanelled, but the rule is subject to many exceptions. *See generally* Downum v. United States, 372 U.S. 734 (1963).

6. The provisions of 18 U.S.C. § 3731 narrowly circumscribe the government's right to take an appeal, and are the exclusive source of that right in the general run of criminal cases. *See* United States v. Dibella, 369 U.S. 121 (1962). § 3731 was amended in 1968 by the Crime Control Act, Pub.L. 90-351, to provide for an appeal from an order granting a motion to suppress evidence.

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Of course, other pretrial motions might sometimes be appropriate, such as a motion for severance under F.R.Crim.P. 8 and 14, or a motion to dismiss premised upon procedural irregularities not discussed below. See the works on criminal procedure cited at ¶ 2001 *supra.*

The form of motions varies greatly from jurisdiction to jurisdiction. However, the request for relief portion of the moving papers is generally in same form, and a memorandum of points and authorities (sometimes cast in the form of counsel's affidavit) may almost always be filed. The court's practice may also dictate whether each request is to be presented separately or whether all are to be brought together in a single motion for many kinds of relief. In any case, the moving language should be clear and concise, *e.g.*:

> "The defendant, John Jones, by his undersigned counsel and pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure, moves to dismiss the indictment presently pending against him. The grounds for this motion, as more particularly set forth in the attached memorandum of law, are that:
>
> "1. The indictment utterly omits to set forth facts constituting an offense against the United States, and is vague and indefinite.
>
> "2. . . . "

The supporting memorandum of points and authorities should be in the form of a crisp, persuasive brief.

¶ 2202. Sufficiency of the Indictment

The quality of criminal pleading in the federal courts is not generally high. Many indictments, upon analysis, turn out not to be the "plain, concise and definite written statement of the essential facts constituting the offense charged," which F.R.Crim.P. 7(c) requires. On the other hand it must be said that trial courts generally have little patience with motions addressed to the sufficiency of the charging papers, taking the view that the Federal Rules of Criminal Procedure were designed to permit a simple form of indictment, amounting almost to "notice pleading."[1] The principal reason, therefore, for attacking the face of the indictment is not the prospect of success at trial, but in order to have a point to raise upon appeal, in the event of a conviction.[2] The procedural history of several noted cases in the past decade suggests that in cases in which the constitutional issues are controversial or difficult, the courts may look to the sufficiency of the indictment as a means of resolving the case favorably to the defendant.[3] Principal among these cases are the contempt of Congress prosecutions in which the first amendment issue raised by persons who had allegedly been contumacious (2 U.S.C. § 192) before the committee on Un-American Activities was either quite difficult or resolved against the contemnors, but in which the courts turned to a consideration of whether the indictments stated an offense.[4]

The principal purposes of pleading clearly in setting out the elements of the offense are three:

1. To inform the defendant of the nature and cause of the accusations against him, as required by the sixth amendment.[5]

2. To protect the defendant against double jeopardy, by ensuring that the indictment alone is a sufficient statement of the crime charged so that, after jeopardy has attached, the defendant may not be again held to answer for the same charge.[6]

1. On "notice pleading," *see* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 Yale L. J. 1149 (1960), probably the most perceptive work in its field in this decade. *See also* 8 Moore, Federal Practice ¶ 12.04 (Cipes ed. – Criminal Rules); 2 Orfield, Criminal Procedure Under the Federal Rules, §§ 12:83-12:103 (1966). There is no need to belabor the obvious point that challenges to the face of the indictment are seldom successful. This paragraph will not collect cases of failure in this department, for reasons of space and relevence. Rather, the purpose of this paragraph is to suggest a tactical approach toward challenging indictments, in order to provide one more means to conclude the case in favor of the accused.

2. Indeed, dismissal prior to trial might be harmful to the defense, since it merely gives the prosecution an opportunity to replead to study its case again with an eye to maximizing its chances of success. If there is a dismissal for failure to state an offense, the government may appeal. 18 U.S.C. § 3731.

3. The first of such cases is United States v. Lattimore, 215 F.2d 847 (CA DC 1954), affirming in part and reversing in part an order of Judge Youngdahl in dismissing perjury the indictment against Asia scholar and McCarthy *bête noir* Owen Lattimore. Subsequently, Lattimore was reindicted, and Judge Youngdahl again dismissed in a scholarly opinion discussed below, at note 9. 127 F. Supp. 405 (D.D.C.), *aff'd by an equally divided court,* 232 F.2d 334 (CA DC 1955). In subsequent years, other dismissals have included United States v. Lamont, 236 F.2d 312, 317 (CA2 1956) (per Charles Clark, J.); Russell v. United States, 369 U.S. 749 (1963).

4. *Russell,* note 3 *supra:* Gojack v. United States, 384 U.S. 702 (1966); *Lamont,* note 3 *supra:* United States v. Seeger, 303 F.2d 478 (CA2 1962); Popper v. United States, 306 F.2d 290 (CA DC 1962).

5. Russell v. United States, 369 U.S. 749, 763-66 (1962). *Russell* is a major theoretical statement of the view of criminal pleading adopted in this paragraph of the *Manual.* It cites with approval a number of lower federal court cases, 369 U.S. at 766 n.13. It has subsequently been followed in, *e.g.,* United States v. Cobert, 227 F. Supp. 915 (S.D. Calif. 1964), also a detailed opinion, analyzing many cases.

6. *Russell,* note 5 *supra,* 369 U.S. at 764. The Court notes that after trial, the accused may resort to the parol evidence of the record to resist a second prosecution for the same offense. In practice, therefore, the "double jeopardy" point is not helpful in argument on appeal, unless it may be urged that the indictment in a particular case is representative of those in a number of cases and therefore that the court may look beyond the case before it in considering possible double jeopardy problems.

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3. To protect the independance of the grand jury, by ensuring that it considers each element of the alleged offense and has before it enough evidence to be able to describe the alleged offense in reasonable detail.[7]

To begin, there are rules of construction which should be urged upon the court in testing the sufficiency of an indictment. Generally, as the court said in *Fontana v. United States*:[8]

> "When one is indicted for a serious offense, the presumption is that he is innocent thereof, and consequently that he is ignorant of the facts on which the pleader founds his charges, and it is a fundamental rule that the sufficiency of an indictment must be tested on the presumption that the defendant is innocent of it and has no knowledge of the facts charged against him in the pleading."

Moreover, in cases in which a first amendment claim is or could be made, Judge Youngdahl of the District of Columbia has set out a standard for testing the sufficiency of an indictment not unlike that used to test the permissable limits upon the vagueness and breadth of a statute in claimed conflict with the first amendment:

> "[W]hen the charge in an indictment is in the area of the First Amendment, evidencing possible conflict with its guarantees of free thought, belief and expression, and when such indictment is challenged as being vague and indefinite, the court will uphold it only after subjecting its legal sufficiency to exacting scrutiny."[9]

After these general sentiments have been integrated into counsel's analysis, the indictment should be scrutized with an eye to its three principal functions, listed above.

1. *Apprisal.* Does the indictment tell the defendant exactly what he is supposed to have done, not leaving him to guess which of several different things the grand jury might have had in mind? Despite the generality of § 12 of the Act, does the indictment itself go beyond that generality and define each element of the particular offense of which the defendant is charged:

> " 'It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offense in the language of the statute; but it must state the species--it must descend to particulars," [citation omitted]. An indictment not framed to apprise the defendant with reasonable certainty of the nature of the accusation against him . . . is defective, although it may follow the language of the statute.' "[10]

And, of course, the Selective Service System is constructed not only of statutory provisions, some of them vague, but of various regulatory and advisory provisions, copious and often unclear. In such circumstances, it is well to insist that the indictment spell out the regulatory provision relied upon and indicate just how the defendant allegedly violated it.[11]

Moreover, in assessing the sufficiency of the indictment, the facts of the case as the lawyer has developed them may become important. If the violation of law is reasonably technical, dismissal of the indictment may lead the government to abandon the prosecution without appealing or seeking to replead. If the dismissal motion is denied, the fact that careful pleading might have obviated the prosecution by showing the pleader that his case was weak may be a strong arguing point on appeal.[12] It is not enough, one may argue, that an indictment should allege a technical violation in the words of the stature or regulation. The indictment should set forth enough facts to show a violation pertinent to a substantial government interest. In this connection, the following is instructive:

> " 'The fact that the statute in question, read in light of the common law, and other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.' "[13]

Finally, upon this branch of the discussion, the lawyer should analyze his case in light of the whole body of selective service law to determine if one or another of the elements of the offense have such an importance in the conduct of the case that it should be alleged with particular clarity and in particular detail. For example, in a false statement case, the indictment should perhaps spell out just how the statement related to

7. *Russell, supra* note 5, 369 U.S. at 770-71 (1962) (citing many authorities); Standard Oil Co. of Texas v. United States, 307 F.2d 120 (CA5 1962)

8. 262 Fed. 283, 286 (CA8 1919) (WWI sedition case).

9. United States v. Lattimore, *supra* note 3, 127 F. Supp. at 407. In Dombrowski v. Pfister, 380 U.S. 479, 486 (1965), the Court alluded to the danger that an overbroad and vague statute poses to freedom of expression. The meaning of such a statute, the court said, should not be left to definition in a series of criminal cases, for such a course would deter freedom of expression pending resolution of the ambiguities in the statute. Much the same point may be made of rules of criminal pleading permitting the government to plead in vague and general terms.

10. *Russell, supra* note 5, 369 U.S. at 765.

11. *See generally Russell, supra* note 5; Van Liew v. United States, 321 F.2d 664 (CA5 1963); note 12 *infra.*

12. By forcing the government to plead its theory with particularity, one may raise for consideration a legal fallacy underlying its case. *See* ¶ 2203 *infra.* When the indictment rests upon an alleged violation of a complex regulatory scheme, the government must plead with sufficient particularity to inform the defendant of which regulatory provision he has violated and how he has done so. Corson v. United States, 147 F.2d 437 (CA9 1944); United States v. Ferranti, 59 F. Supp. 1003 (D. N.J. 1944).

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the classification process or otherwise did harm or could have harmed a real interest of the System.[14] An argument could then be made by analogy to *Russell v. United States,*[15] in which the court held that the importance, in a contempt of Congress case, of the relevance of the testimony sought to the subject matter under inquiry, required the government to spell out the subject under inquiry in some detail. This rule has subsequently been followed in dismissing a perjury indictment for failure to spell out the materiality of the allegedly false testimony,[16] In sum, the lawyer should carefully analyze the indictment and ask: Is every element that the defense contends the government must prove at trial set out here, and if so, is each such element adequatelv and clearly alleged?[17]

2. *Double jeopardy.* While serving to protect the defendant against double jeopardy, the indictment is not alone in conferring this benefit. A bill of particulars can remedy possible double jeopardy problems,[18] and after the trial, the defendant has the benefit of the trial record to enable a court in which he is later charged to determine the nature of the offense for which he was first tried.[19]

As a practical matter, therefore an allegation that the indictment puts the defendant in danger of being twice tried for the same offense is of little practical significance. Only if the facts of the case take on a peculiar pattern, see ¶ 2762 *infra,* will it be possible to rely on this argument.

3. *Independence of the grand jury.* There has come into being in recent years a tendency to disregard the constitutional independence[20] of the grand jury. The extensive use of hearsay evidence before the grand jury, sometimes going to the extent of using only one witness--a law enforcement officer--to summarize police reports, or of omitting to put all elements of an offense into proof of some kind before the grand jury, are two examples of this trend.[21] Another example, relevant for present purposes, is the practice of having the prosecutor draft the indictment and put on a limited proof before the grand jury then secure the voting of the previously prepared indictment. It is perhaps unexceptionable that the prosecutor should draft the indictment, for he is legally-trained and the grand jurors are not. But the use of the short form indictment combined with skeleton proof severely undercuts the grand jury's independence.

This fact has three ramifications relevant for present purposes. First, the grand jurors cannot exercise independent judgment in light of all the facts as to whether the defendant should be indicted or not. Experienced practitioners have reported receiving bits of grand jury testimony during trial reflecting grand juror concern over the propriety of returning an indictment in this or that draft law case, and if the prosecutor can avert attention from the merits by putting in a thin and technical case, he can sidetrack this concern.

Second, the prosecutor and not the grand jurors choose the theory upon which the case is to be tried. As the Supreme Court said in *Russell*:

> "To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For the defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him."[22]

Third, the Court alluded in *Russell* to the importance of specificity to enable the reviewing court to determine whether the charge made by the grand jury was sustained upon the evidence.

In sum, the defense counsel presented with the typical selective service indictment drawn in the words

13. Ornelas v. United States, 236 F.2d 392, 393 (CA9 1956), quoting United States v. Carll, 105 U.S. 611, 612 (1882). *Carll* was also cited with approval in *Russell,* 369 U.S. at 765.

14. The task of analysis may be made easier by reference to United States v. Lybrand, 279 F. Supp. 74, 1 SSLR 3002 (E.D. N.Y. 1967), which discusses in detail the facts and circumstances which require a holding that a particular selective service procedure must be proved by the government to have been followed. The same process of reasoning employed in establishing what is an element of the offense may be used to determine what is an *important* element of the offense.

15. 369 U.S. at 755-65.

16. United States v. Cobert, *supra* note 5.

17. It may be that two separate offenses are charged in one count. If so, the count is duplicitous. A detailed discussion of duplicity is a matter outside the scope of this *Manual. See* Bins v. United States, 331 F.2d 390 (CA5 1964); United States v. Goodman, 285 F.2d 378 (CA5 1960); United States v. Bachman, 164 F. Supp. 898 (D. D.C. 1958); United States v. Shackleford, 180 F. Supp. 857 (S.D. N.Y. 1957); United States v. Forys, 113 F. Supp. 580 (D. R.I. 1953); United States v. Martinez-Gonzales, 89 F. Supp. 62 (S.D. Calif. 1950).

18. *See* Yeargain v. United States, 314 F.2d 881 (CA9 1963).

19. *Russell, supra* note 5, 369 U.S. at 764.

20. The right to be tried upon an indictment is contained in the fifth amendment. Among notable recent statements regarding the independence of the grand jury, *see* Stirone v. United States, 361 U.S. 212 (1960); United States v. Umans, 368 F.2d 725, 730 (CA2 1966), *cert. dism. as improvidently granted,* 389 U.S. 80 (1967).

21. *Stirone* and *Umans, supra* note 20, are examples. Use of hearsay testimony as the exclusive basis for an indictment was discussed and approved in Costello v. United States, 350 U.S. 359 (1956), *but see* Burton, J., concurring, 350 U.S. at 364. *Compare* Brady v. United States, 24 F.2d 405 (CA8 1928). The *Brady* premise that exclusive reliance on hearsay invalidates an indictment is no doubt invlaid in light of *Costello* (although the court in *Umans* suggests that the permissive *Costello* rule on use of hearsay may be under some pressure), but the holding that there must be some evidence of each element of the offense survives a literal reading of *Costello* and is reinforced by such cases as Standard Oil Co. of Texas v. United States, *supra* note 7, which noted that the grand jury probably would not have indicated had it been aware of the elements of the offense charged against the defendants. *Russell, supra* note 5, at 770-71, laments the passing of the grand jury, and does something about it. *See also* United States v. Aleli, F. Supp. -- (E.D.N.Y. 1968), abandoning the *Costello* rule for the Eastern District of New York.

22. 369 U.S. at 770.

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of the statute may have an opportunity to insist upon the grand jury being given a real opportunity to decide whether or not it will indict, and to choose the extent of the defendant's liability, as a "group of his fellow citizens acting independently of either prosecuting attorney or judge."[23]

23. Stirone v. United States, *supra* note 21, 361 U.S. at 218.

¶ 2203. Bill of Particulars

Tactically, the lawyer faced with a vague indictment has difficulty choosing whether to ask for a bill of particulars or not. On the one hand, granting the particulars may cure the defect in the indictment. On the other, failing to move for them may impress an appellate court as a waiver of the claim that the indictment was insufficient. Lawyers disagree as to the resolution of the dilemma. On balance, it seems best to ask for a bill of particulars even as to matters which it is claimed should have been in the indictment, and then to rely upon the statement in *Russell v. United States,* reflecting a large body of law, that a bill of particulars cannot cure an invalid indictment.[1] Moreover, if in order to fully inform the defendant of the charge an extensive bill of particulars is necessary, it becomes clear that the prosecutor, and not the grand jury, is choosing the theory of the case by filling in the vague indictment. Defense counsel can then say that while particulars are appreciated because they help the defendant to meet the government's case at trial, they do not obviate the vagueness of the indictment itself.

What particulars should counsel ask for? This judgment should be made in light of the general rule on bills of particulars under F.R.Crim.P. 7(f). It should first be noted that Rule 7(f) was amended in 1966. Formerly it read that "The court for cause may direct the filing of a bill of particulars." The words "for cause" were stricken in 1966 in order, according to the Advisory Committee on Criminal Rules, "to encourage a more liberal attitude by courts."[2] The Advisory Committee notes to the amendment cited *United States v. Smith*[3] as a good example of a wise use of discretion under the rule. In *Smith,* Judge (later Justice) Whittaker said:

> "[T]he fact that an indictment or information conforms to the simple form suggested in the rules is no answer or defense to a motion for a bill of particulars under Rule 7(f). Rule 7(f) necessarily presupposed an indictment or information good against a motion to quash or a demurrer. Its proper office 'is to furnish further information respecting the charge stated in the indictment when necessary to the preparation of his defense, and to avoid prejudicial surprise at the trial,' and when necessary for these purposes, is to be granted even though it requires 'the furnishing of information which in other circumstances would not be required because evidentiary in nature' and an accused is entitled to this 'as of right.' [Citations omitted.] It seems quite clear that 'where the charges in the indictment do not sufficiently advise defendant of the specific acts with which he is charged, particulars should be ordered.' "[4]

Judge Whittaker's observations suggest the outlines of and the limits upon a motion for a bill of particulars. A bill is used to get at further facts, to fill in the gaps in the indictment, and to prevent surprise.[5] It also serves to protect against double jeopardy.[6] What exactly may be the subject of a bill is the subject of hundreds of district court cases, there being few appellate authorities.[7]

In a selective service case, particulars might be sought concerning the specific statutory provisions and rules and regulations which underlie the charge, as in *United States v. Gale,*[8] or the details of an order that the defendant is alleged to have violated,[9] or the portions of an allegedly falsified form upon which the government will rely in proving falsity,[10] or whether the defendant is charged as a principal or as an aider and

1. 369 U.S. 749, 769-70 (1962).

2. Accounts of the amendment and of the Advisory Committee's view of it are to be found in U.S.C.A., under F.R.Crim.P. 7; in 8 Moore, Federal Practice ch. 7 (Cipes ed. – Criminal Rules); 39 F.R.D. at 170 (1965). Most citations in this *Manual* are to the F.R.D. compiliation of Advisory Committee notes.

3. 16 F.R.D. 372 (W.D. Mo. 1954), cited 39 F.R.D. at 170.

4. 16 F.R.D. at 374-75.

5. 8 Moore, Federal Practice ¶ 7.06 (Cipes ed. – Criminal Rules) is the best short discussion. For more extended treatment, *see* 1 Orfield, Criminal Procedure Under the Federal Rules ¶¶ 7:129-7:148 (1966). Many bill of particulars cases have arisen in the tax field, and tax publications are also helpful places to look for ideas, given particularly the correspondence at points between the Selective Service and Internal Revenue regulatory systems.

6. Yeargain v. United States, 314 F.2d 881 (CA9 1963).

7. 8 Moore, Federal Practice ¶ 7.06[2] (Cipes ed. – Criminal Rules), citing United States v. Metropolitan Leather & Find. Ass'n, 82 F. Supp. 449 (S.D. N.Y. 1949).

8. 35 F. Supp. 659 (E.D. N.Y. 1940).

9. The analogy here is to United States v. Cafaro, 26 F.R.D. 170 (S.D. N.Y. 1960), in which the government was ordered to identify the allegedly false loan application on which it would rely in a trial under 18 U.S.C. §§ 220 and 1010, and with respect to each, the portion alleged to be false. The government must, in an income tac prosecution, identify the allegedly false entries with as much specificity as the circumstances permit. United States v. Dolan, 113 F. Supp. 757 (D. Conn. 1953), even though the indictment generally pleads such cases in the words of the statute with a dollar amount allegedly evaded. *See also* United States v. Yetman, 196 F. Supp. 473, 474 (D. Conn. 1961), holding the defendant entitled in a perjury case to a bill of particulars detailing the questions and answers to which he allegedly made false response. In *Yetman,* some of the counts of the perjury indictment contained multiple questions and answers.

10. *See Cafaro* and *Yetman,* note 9 *supra.*

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abettor,[11] or the means by which the defendant committed the offense.[12] One court has said that when the charge is vague and indefinite, the government should spell out in a bill of particulars every overt act that it intends to prove in support of the indictment.[13]

The form of a motion for bill of particulars, which should be varied to meet local district court requirements, is roughly as follows, following the caption and title:

> "The defendant, John Jones, through his undersigned counsel and under Rule 7(f) of the Federal Rules of Criminal Procedure, moves this court for an order directing the United States Attorney to file a bill of particulars embracing the following matters:
>
> "1. State under which of the sections of the 'Military Selective Service Act of 1967' and under which of the 'rules, regulations and directions made pursuant thereto,' the defendant was ordered to report for and submit to induction.
>
> "2. State whether all persons classified I-A and subject to call prior to the defendant were ordered to report for induction prior to issuance to the defendant of an order to report for induction."

In another case the request might be:

> "1. State whether the defendant is charged as being a principal in the alleged mutilation and destruction of the draft cards, or as an aider and abettor, and if the latter, the manner in which he allegedly aided and abetted."

Obviously, the answers to some of these requests may give rise to a dismissal motion, or raise for early determination a dispositive legal question. For example, request number two in the first example may pose the question whether proper "order of call" is an element of the offense which must be pleaded and proved by the prosecution,[14] or whether it is a matter merely of defense. Thus, briefs and argument would focus upon the holding in *United States v. Lybrand,* that proper order of call is an element of the offense, and if the answer to the bill (assuming the court grants it) is that the required order of call was not followed, then a dismissal may be in order.[15] See ¶2209 *infra* on raising factual defenses prior to trial.

The memoradnum of points and authorities in support of the motion for bill of particulars will vary in form according to the local rules. It should begin with a general statement of the principles underlying the grant of a bill, setting out the meaning of the 1966 amendment F.R.Crim.P. 7(f) and the reasoning of the *Smith* case. Each request should then be separately supported by authority and argument. There are very few selective service cases raising bill of particulars questions, and it will therefore be necessary to rely upon analogous areas of law, including where appropriate administrative regulations, prosecutions, false statement and perjury statutes, and conspiracy statutes. Good sources for cases on point include the detailed annotations in United States Code Annotated under F.R.Crim.P. 7 and the appropriate subheadings in West Publishing Company's *Modern Federal Practice Digest,* under the heading "Indictment and Information."

11. United States v. Lieberman, 15 F.R.D. 278 (S.D. N.Y. 1953); United States v. Baker, 262 F. Supp. 657, 674 (D.D.C. 1966). *See also* United States v. Van Allen, 28 F.R.D. 329 (S.D. N.Y. 1961). None of these were selective service cases.

12. No direct authority appears to exist for this proposition. *See* Eagelston v. United States, 172 F.2d 194 (CA9), *cert. denied,* 336 U.S. 952 (1949), impliedly holding that it is proper to specify the means by which the offense was committed. *Compare* United States v. Cafaro, 26 F.R.D. 170 (S.D. N.Y. 1960), in which the government was required to specify the precise portions of allegedly fraudulent loan applications which were false. In general, United States v. Smith, *supra* note 3, is a good guide to framing detailed requests for particulars.

13. United States v. Lattimore, 112 F. Supp. 507, 520 (D. D.C. 1953). *Lattimore* was a perjury case.

14. United States v. Lybrand, 279 F. Supp. 74, 1 SSLR 3002 (E.D. N.Y. 1967) holds that proper order of call is an element of the offense of refusal to report for civilian work. Lowe v. United States, 389 F.2d 51, 1 SSLR 3007 (CA5 1968), is to the contrary. *See* ¶1121 *supra* on order of call. As to pleading elements of the offense, *see* ¶2202 *supra.* If "order of call" is an element of the offense, an indictment omitting to allege it would also be subject to a motion to dismiss. *See* ¶2202 *supra.*

15. Generally, the government is bound by its bill of particulars, although Rule 7(f) explicitly provides that it may amend at any time under such conditions as justice requires. *See* United States v. Neff, 212 F.2d 297 (CA3 1954) (government is confined to particulars it has specified as though they were part of indictment).

¶2204. Jury Selection

A challenge to the manner in which the grand and petit juries were selected is made in the form of a motion to dismiss the indictment to challenge the grand jury selection and a motion to strike the jury panel to challenge the means by which the petit jury is to be selected. While technically it may be possible to reserve the petit jury challenge to the eve of trial, it is perhaps best to make it at the same time as the grand jury challenge.[1] The legal issues are the same, since federal grand and petit juries are selected in the

1. Frazier v. United States, 335 U.S. 497 (1948), held a challenge first made halfway through vior dire to be untimely. United States v. Hoffa, 235 F. Supp. 611 (E.D. Tenn. 1964), held a challenge deferred until a month or so after counsel had learned of the claimed irregularity to be untimely. Dicta in Higgins v. United States, 160 F.2d 222 (CA DC 1946), *cert. denied,* 331 U.S. 822 (1947), uphold the timeliness of a motion filed just before commencement of the voir dire. In apparent contradiction is the opinion in United States v. Baker, 266 F. Supp. 461 (D. D.C. 1967). However, in *Baker,* the court of appeals reached the merits on the jury selection issue, thereby impliedly rejecting the district court's view. — F.2d —, — (CA DC 1968). *See also* text accompanying note 2 *infra.*

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same manner, and early filing will obviate any possible claim of untimeliness.

The Jury Selection and Service Act of 1968, effective as of December 22, 1968, requires that the challenge to the grand or petit jury be made "before the voir dire examination begins, or within seven days after the defendant discovered, or could have discovered by the exercise of diligence, the grounds therefor, whichever is earlier."[2]

This *Manual* is an inappropriate place in which to restate the law of jury selection in federal courts, particularly in light of the codification of much of that law in the Jury Selection and Service Act of 1968, and the wealth of data on jury selection available in the Act's legislative history[3] and in recent judicial decisions.[4] However, aspects of the jury selection process pecularily applicable to draft cases should be discussed. It was commented upon in the course of hearings on the 1968 Act that jury selection practices based upon lists of registered voters have a tendency to exclude large groups of persons in our increasingly mobile society.[5] Hardest hit by these methods are the young (21-35), socially mobile group of middle-class persons, and low-income and minority groups who may not be interested in electoral politics. Yet most selective service defendants are members of these groups. Therefore, a selective service defendant has powerful reasons for wanting the base of selection to be as broad as possible. The 1968 Act, it should be said, forbids use of voter lists as a source of names if such lists would not produce a random cross-section of the community.

It has been clearly held, upon a composite of constitutional and statutory premises, that jury selection officials have an affirmative duty to secure a cross-section of jurors.[6] All questions of systematic exclusion of a class or group aside, this affirmative duty may invalidate a selection system which does not produce a cross-section. And the defendant need not be a member of the group or groups which are underepresented in order to challenge the system of selection.[7] Second, of course, the jury selection officials must not discriminate against an identifiable class or group, be it Negroes, Mexican-Americans, wage-earners, women or whatever.[8] Third, the statute vests in the court the job of identifying classes of persons which ought to be excused from jury service. The clerk or other nonjudicial jury selection official may not arrogate to himself the task of making these choices.[9]

The first and third arguments rest in part upon statutory premises implicit in 28 U.S.C. §§ 1861-70 since 1957[10] and explicit with the 1968 amendments to those sections.[11] The first and second also rest in part upon a constitutional premise. The constitutional provisions relevant here are the fifth and sixth amendments, for we are of course dealing with federal juries. The fifth amendment proscribes, through its due process clause, arbitrary classifications and exclusions in much the same manner as does the equal protection clause of the fourteenth amendment.[12] The sixth amendment guarantees the right to trial by an impartial jury, and is the source of the constitutional argument for an affirmative duty to secure a cross-section. The "jury" referred to in the sixth amendment is to be selected in accordance with the "basic concepts of a democratic society" unfettered by "limitations . . . inherent in the historical common law concept of the jury . . ."[13]

Proving a case of jury exclusion is difficult. To begin, counsel should enquire into the means by which jurors are chosen in the particular federal judicial district. A search of the reported and unreported cases may reveal some judicial opinion describing the jury selection system. Experienced practitioners may be aware of it. Interviews with court personnel may produce valuable information. Hearings transcripts and other documents may provide insight.[14] Newspaper reporters on the courthouse beat will very often have information on selection practices. It may be necessary informally to ask the government for assistance or to move for discovery and inspection of government records relating to jury selection.[15] The results of this

2. The Jury Selection and Service Act amends 28 U.S.C. §§ 1861-69, to provide for a "random cross-section" jury selection system.

3. Federal Jury Selection, Hearings before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, March 21, 22, 29, April 11, 12, May 2, 16, June 6, 28, July 20, 1967.

4. Principally Rabinowitz v. United States, 366 F.2d 34 (CA5 1966).

5. Testimony of Dale W. Broeder, Federal Jury Selection, *supra* note 3, at 66-67.

6. Rabinowitz v. United States, 366 F.2d 34, 55 (CA5 1966).

7. *Rabinowitz,* 366 F.2d at 37 n.1. Allen v. State, 137 S.E. 2d 711 (Ga. Ct. App. 1964).

8. Cassell v. Texas, 339 U.S. 282 (1950) (Negroes); Hernandez v. Texas, 347 U.S. 475 (1954) (Mexican Americans); Ballard v. United States, 329 U.S. 187 (1946) (women); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946) (day laborers); Glasser v. United States, 315 U.S. 60 (1942)(all women except members of the League of Women Voters) (dictum).

9. Rabinowitz v. United States, 366 F.2d at 54.

10. *Rabinowitz* rested, for this proposition, upon 28 U.S.C. § 1863(b).

11. 28 U.S.C. § 1863(b)(5) of the 1968 Act leaves it to the chief judge of each district to make findings as to classes of persons who should be excluded.

12. So held in Bolling v. Sharpe, 347 U.S. 497 (1954).

13. Glasser v. United States, 315 U.S. 60, 85 (1942).

14. *See, e.g.,* testimony of Monroe Freedman, Esq., Federal Jury Selection, *supra* note 3, at 176. Professor Freedman is a first-rate lawyer and constitutional scholar.

15. The Jury Selection and Service Act of 1968, 28 U.S.C. § 1868, effective December 22, 1968, provides that records concerning jury selection "shall be available for public inspection for the purpose of determining the validity of the selection of any jury." This provision is apparently responsive to a suggestion by Professor Freedman, *supra* note 14, at 179.

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investigation should then be incorporated into affidavits to be annexed to a motion with accompanying memorandum of points and authorities. In the motion, a full hearing should be asked for in order further to develop the facts. Because of the slim chance that a hearing will be granted, it is important to set out the facts in unusually complete detail,[16] in order to lay a basis for appeal.

Witnesses for the hearing should include all the officials and court personnel involved in jury selection.

Often a sociologist or sociology student will be willing to undertake an investigation of jury selection practices for a case or group of cases, perhaps out of sympathy with the defendant's principles. Such an approach to a motion to dismiss should not be overlooked.

16. Building a record in a jury selection case is difficult. Some approaches are suggested by examining the *Rabinowitz* opinion, 366 F.2d 34 (CA5 1966), and Nolan v. United States, 395 F.2d 283 (CA5 1968), in which the court held that an adequate showing had not been made concerning exclusion. Of course, a prima facie showing of exclusion shifts the burden to the government to justify selection practices, *e.g., Rabinowitz,* 366 F.2d at 58; Labat v. Bennett, 365 F.2d 698 (CA5 1966), and a prima facie improper method of selecting jurors invalidates the selection system, Avery v. Georgia, 345 U.S. 559 (1953).

A motion challenging the jury selection practices in a particular district might read as follows:

> "John Jones, through his undersigned counsel and under Rule 12, Federal Rules of Criminal Procedure, moves this court for an order dismissing the indictment and, in the alternative, to strike the panel from which the petit jury is to be chosen. The grounds for this motion, as more particularly set forth in the attached affidavit and memorandum of points and authorities, are:
>
> "1. The jury is selected from voter registration lists, and these lists exclude large numbers of university students and other young persons in this judicial district, and therefore do not produce the constitutionally and statutorily required random cross section of the community.
>
> "2. The court clerk is in the habit of excusing persons for jury service who call on the telephone and ask to be excused, a practice which deprives defendant of his right to have the judge decide cases of excuse or exclusion and which distorts the representative character of the jury selection pool.
>
> "3. Although Negroes represent 34% of the population of this judicial district, they comprise only 24% of the persons selected for jury service."

¶ 2205. Discovery Generally

Discovery under F.R.Crim.P. 16 and 17 and inspection of the grand jury minutes under F.R.Crim.P. 6(e) constitute valuable means of gathering information about the government's case. In general, the amount of discovery requested will turn upon the complexity of the case, the desire of counsel to raise and preserve points relating to discovery, the willingness of government counsel to cooperate in turning over material without the making and granting of a formal motion, and the willingness of counsel to run the risk that the government will invoke its right (under certain circumstances, see F.R.Crim.P. 16(c) to discover from the defense.

The first question to consider is whether and to what extent the prosecution will voluntarily turn over information in its possession. If the Assistant United States Attorney assigned to the case will show counsel his entire case file, then there is no need to file a discovery motion, and the process of finding out about the government's evidence can be pursued along with pretrial negotiations.

If this approach does not work, then a motion can be made.

¶ 2206. Discovery—Rules 16 and 17

F.R.Crim.P. 16 and 17 outline the basic structure of federal discovery law. Prior to the 1966 amendment of Rule 16, its usefulness was marginal and reliance was often placed upon the provisions of Rule 17, the subpoena rule, to obtain documents and objects prior to trial.[1] This use of rule 17 was severely limited by the Supreme Court in *Bowman Dairy*,[2] and with the 1966 amendment of Rule 16 it seems likely that Rule 17 will be used only as a means of gaining evidence for use at trial.

Rule 16, as amended in 1966, provides for discovery and inspection of several classes of materials, under differing standards. Rule 16(a)(1) permits the court to order production of a defendant's relevant prior statements, including those within the custody or control of the government whose existence is known

1. *See generally* 8 Moore, Federal Practice ch. 17 (Cipes ed. – Criminal Rules).

2. Bowman Dairy Co. v. United States, 341 U.S. 214 (1951), interpreted in the leading case of United States v. Iozia, 13 F.R.D. 335 (S.D. N.Y. 1952). These cases establish that Rule 17 is designed to permit the defendant to obtain documents which are evidentiary in character and relevant to the issues framed for trial of the case. However, *Iozia* underscores that it is possible to use Rule 17 to obtain materials for use in advance of trial. A subpoena in a federal criminal case is issued in blank by the court clerk, and may be either *duces tecum* (subpeona to produce document of object) or *ad testificandum* (subpeona to testify). Counsel then makes out and signs the subpeona and has it served in a proper manner by tendering the subpeona and the witness fee and mileage, 28 U.S.C. § 1821. Every U.S. Marshal's office has a chart setting out the standard mileage fees for service within the United States. The problem of witnesses abroad may be solved by reference to the deposition provisions of F.R.Crim.P. 15, or by use of 28 U.S.C. § 1783. *See also* United States v. Powell, 156 F. Supp. 526 (N.D. Calif. 1957) (government may not by use of power to deny passport restrict search for evidence abroad). Indigent subpeonas are issued under F.R.Crim.P. 17 (b), as amended in 1966. *See* Advisory Committee Notes, 39 F.R.D. at 179.

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or in the exercise of due diligence might become known to the attorney for the government. The language "the court may order" production of the statements almost amounts to a statement that the court *shall* order, given the Advisory Committee on the Criminal Rules statement that production of prior statements is the "better practice" and the discussion of the question in Supreme Court decisions.[3] In draft cases, prior statements may include those made at the induction center (AR 601-270, para. 40(c)(1) requires AFEES officials to solicit such statements from induction refusers), statements made to the local board or other Selective Service System officials, and statements made to other law enforcement authorities. The vital importance and considerable impact which these statements may have when admitted into evidence dictates that they should be obtained. See ¶ 2101 *supra*.

Rule 16(a)(2) deals with the discovery of scientific tests and experiments. This section is in general of little use in selective service cases, although there are circumstances in which it might be helpful. If the Defense Department or the Selective Service System has records relating to the consideration of the defendant's physical or mental condition (including such things as memoranda, reports and workups in the office of the Army Surgeon General), and this condition is relevant to the case, a motion under Rule 16(a)(2) is appropriate. The rule is designed, obviously, to redress the disparity in scientific testing resources as between the defense and the government and as such should be liberally construed.[4]

Rule 16(a)(3) permits a defendant to discover his own grand jury testimony. Given the few occasions on which a defendant will testify before a grand jury, the rule is of little practical use in most selective service cases. Its application has been discussed in several cases,[5] and it is to be distinguished from the F.R. Crim.P. 6(e) provision for disclosure of grand jury testimony, discussed in ¶ 2207 *infra*.

Rule 16(b) is a general provision for inspecting and copying books, records, documents, objects and other things in the possession, custody or control of the government. The prerequisites for inspection are a showing of materiality and that the request is "reasonable." Rule 16(b) is rather like the whole of former Rule 16, relating to inspection and copying, except that new Rule 16(b) eliminates the requirement of the former rule that the materials have been obtained by the government sought from, or belong to, the defendant or have been obtained by the government from others by seizure or process. Specifically exempted from discovery are internal government documents and reports,[6] and statements by prospective witnesses made to government agents, which are producible only after the witness has testified at trial under 18 U.S.C. § 3500 (the Jencks Act), See ¶ 2260 *infra*. Rule 16(b) is thus useful to discover such materials as physical evidence (draft card fragments, films, still photographs, etc.) in the possession of the government.

Rule 16(c) permits reciprocal discovery by the government, in cases in which the defendant has obtained discovery under Rule 16(a)(2) or 16(b). This "quid pro quo" provision exempts from its terms attorney's or investigator's work product statements of the defendant or his prospective witnesses.[7]

Rule 16(e) deals with protective orders for materials of a privileged character and Rule 16(g) with continuing duties to disclose and with the sanctions (including the vitally-important sanction of ruling out of evidence (inadmissible) material which should have been disclosed) for failing to make discovery (produce).

Rule 16(f) provides that the motion must be made within ten days after arraignment or at such later date as the court may permit.[9]

A motion for discovery, in addition to stressing the points made above, should deal specifically with the importance of the material asked for to the particular case. Discovery of the following may be helpful:

3. The authorities are collected in Advisory Committee Notes, 39 F.R.D. at 175-76. The question of a defendant's constitutional right to see his prior statements was left open in Clewis v. Texas, 386 U.S. 707, 712 n. 8 (1967), but was limitedly upheld in People v. Cartier, 51 Cal.2d 590, 335 P.2d 114 (1959), cited with approval by the Advisory Committee, 39 F.R.D. at 176. A valuable discussion of discovery under the pre-1966 rules appears in a symposium, *Discovery in Federal Criminal Cases,* 33 F.R.D. 47 (1963).

4. The Advisory Committee Notes, 39 F.R.D. at 176, cite several cases upholding a broad range of discovery in this field: State v. Superior Court, 90 Ariz. 133, 367 P.2d 6 (1961); People v. Cooper, 53 Cal.2d 755, 770, 349 P.2d 964, 973 (1960); People v. Stokes, 24 Misc.2d 755, 762, 204 N.Y.S.2d 827, 835 (Ct. Gen. Sess. 1960).

5. *E.g.*, United States v. Aeroquip Corp., 41 F.R.D. 441 (E.D. Mich. 1966); United States v. United Concrete Pipe Corp., 41 F.R.D. 538 (N.D. Tex. 1966); United States v. American Oil Co., 264 F. Supp. 93 (E.D. Mo. 1966). These cases deal largely with the availability to a corporate defendant of the grand jury testimony of its officers, but establish the prinicple that generally a defendant is entitled to his own grand jury testimony. To be distinguished here is the case of grand jury perjury, in which the defendant is routinely entitled to his own, allegedly false, grand jury testimony. United States v. Rosenberg, 39 F.R.D. 301 (S.D. N.Y. 1966).

6. This provision echoes a judicial and legislative policy of protecting such reports from disclosure. *E.g.*, Palermo v. United States, 360 U.S. 343 (1959); Ogden v. United States, 303 F.2d 724 (CA9 1962); Freedom of Information Act. 5 U.S.C. § 552(c). This protection of government documents does not extend, of course, to materials in the possession of government agents which are exculpatory in nature. Brady v. Maryland, 373 U.S. 83 (1963); Barbee v. Warden, 331 F.2d 842 (CA4 1964); Levin v. Katzenbach, 363 F.2d 187 (CA DC 1966), nor to those which may help a defendant rebut a charge against him, Roviaro v. United States, 353 U.S. 53 (1957), Dennis v. United States, 384 U.S. 855 (1966), or which reflect governmental illegality, United States v. Coplon, 185 F.2d 629, 636 (CA2 1950).

7. This portion of the new rule caused a good deal of controversy. The general problem of discovery from a defendant is raised and discussed in the Advisory Committee Notes, 39 F.R.D. at 177. *But see* the statement of Douglas, J., dissenting from adoption of this portion of the rule, 383 U.S. 1089 (1966), and authorities cited and discussed therein.

8. Rule 16(e) provides a means whereby counsel may obtain discovery under orders not to disclose the contents of the material discovered, or under which disclosure may be restricted, denied, or deferred. The considerations justifying invocation of the Rule were briefly touched upon in Dennis v. United States, 384 U.S. 855, 870-872 (1966).

9. Presumably the excusable neglect provisions of Rule 42(a) would excuse an untimely filing.

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1. The defendant's prior statements, written or oral, tape-recorded or taken down in the form of shorthand or written summary.[10]

2. The defendant's selective service file. It is discoverable in part under Rule 16(a)(1), in part under 16(b), and an argument may be made that it is discoverable as a matter of right under the selective service regulations, R1606.32(a).[11]

3. Documentary and physical evidence which the government plans to introduce, including particularly films and pictures. These materials have such an impact upon the jury that the defense should be able to be prepared to meet them.

4. Materials relating to local board performance. The qualifications of board members to serve; the racial composition of the board; the appeal board and the National Board; and other records which may be useful in proving a pattern of unfairness or of departure from the regulations.[12]

The form of a motion for discovery, after the caption and title, is as follows:

> "The defendant, John Jones, through his undersigned counsel and pursuant to Rule 16[13] of the Federal Rules of Criminal Procedure, moves this Court for an order that the United States Attorney furnish the defendant with copies of the following:
>
> "1. All relevant prior statements of the defendant, written or oral, recorded or reduced to writing, in the possession, custody or control of the government, the existence of which is known, or might in the exercise of due diligence become known, to the Attorney for the United States. This request includes, but is not limited to, the transcript or other record of the interview between the defendant and an agent of the Federal Bureau of Investigation [Military Intelligence] on May 10, 1967, at the Armed Forces Examining and Entrance Station, Fort Dodge.
>
> "2. All reports of scientific tests and experiments conducted in connection with this case, including but not limited to the records and results of the physical examination performed on the defendant on March 3, 1967 at Fort Dodge.
>
> "3. The defendant's selective service file.
>
> "4. All records of the appeal board for Maryland pertaining to the classification or processing of the defendant.
>
> "The grounds for this motion, as more particularly set forth in the attached memorandum of points and authorities, are that the requested information is essential to the preparation of the defense in this case."

These requests should then be supported by a memorandum of points and authorities, It is a good idea to separate the requests out and discuss each individually, identifying the portion of F.R.Crim.P. 16 relied upon.

The motion should conclude: "This motion calls for continuing disclosure under F.R.Crim.P. 16(g)( )."

10. The motion should include all the categories of written statement mentioned in the Rule, and should underscore the need that the government make a complete investigation to determine the extent to which such statements exist. *See* People v. Cartier, *supra* note 3.

11. Moreover, it is the practice of the Selective Service System to make a copy of the registrant's file available to him at no charge if he has been indicted for a selective service offense. 1 SSLR 19 (1968). In United States v. Miller, 249 F. Supp. 59, 65 (S.D. N.Y. 1965), the court denied a discovery request for the defendant's draft card. However, *Miller* was decided under the pre-1966 rules, and the court rested its decision upon the failure of the defense to make a showing of "materiality." The pre-1966 discovery cases are collected in Annot., 5 A.L.R.3d 819 (1966); state cases are collected in Annot., 7 A.L.R.3d 8 (1966), and can often be useful for their language and rationale of decision, particularly those from liberal discovery states such as New Jersey, California, and Arizona.

12. This request may be supported by reference to cases holding that the prosecution has an affirmative duty to come forward with exculpatory evidence. *See* note 6 *supra*. *But see* Clay v. United States, — F.2d —, 1 SSLR 3088 (CA5 1968).

13. It may be a good idea to particularize and state which subsection of Rule 16 is relied upon. If the various discovery requests are all clearly identifiable as coming under a particular subsection, it is wise to separate them out in the motion, as follows:

> "The defendant, John Jones, through his undersigned counsel and pursuant to Rule 16, Federal Rules of Criminal Procedure, moves this court for discovery of the following items, which are listed below according to the authority for the particular request:"

Then, list the items under subheadings, such as "Rule 16(a)(1)."

¶ 2207. Discovery—Grand Jury Minutes

Federal Rule of Criminal Procedure 6(e) provides in part that matters occurring before the grand jury may be disclosed "preliminarily to or in connection with a judicial proceeding." The judicial gloss upon this rule states that grand jury minutes are to be disclosed to the defense upon the showing that the defense has a "particularized need" for them which outweighs any countervailing interest on the part of the government in keeping the minutes secret.[1]

In some circumstances, production of the minutes is granted of course upon timely motion, as in the Second Circuit, where the government must produce each trial witness's testimony after he has testified.[2]

1. The leading case is Dennis v. United States, 384 U.S. 855 (1966).

2. United States v. Youngblood, 379 F.2d 365 (CA2 1967).

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or in the District of Columbia Circuit, where disclosure of grand jury testimony of law enforcement officers (concerning the accused admission) is almost a matter of right.[3]

In a draft case, grand jury minutes may or may not be helpful. If the government put before the grand jury only a skeleton case consisting of, for example, the board clerk reading entries from the defendant's file, the grand jury minutes are of no help whatever. But if the grand jury testimony included board members testifying, FBI agent describing a scene, or of any government witness who will testify at trial to events he personally participated in or witnessed, the grand jury minutes are a valuable source of discovery and possible impeachment material. Therefore, counsel is advised to move for them, preferably after finding out from the government who the witnesses were so that he can make an intelligent presentation. The motion should be in the alternative, for production prior to trial and for an order directing that the minutes of each trial witness's grand jury testimony be produced after his trial testimony.[4]

In support of the motion, one may cite and discuss the leading Supreme Court case, *Dennis v. United States*,[5] and its progeny in the circuits.[6]

Dennis is notable principally for putting official imprimatur upon the growing movement for fuller discovery generally, emphasizing that the showing of particularized need rests not upon theoretical propositions largely unverifiable in practice, but upon a practical assessment of the importance of the minutes to the defense in each case. The usefulness of the minutes as a vehicle for discovery and for cross-examination is a guiding consideration and indeed the need for a full and far cross-examination may itself constitute particularized need.[7]

Moreover, *Dennis* has been said to abolish the practice of having the trial judge comb the minutes for contradictions between grand jury and trial testimony as prerequisite for granting disclosure:

> "[I]t is no longer necessary that the trial judge, like a fussy hen, scratch through the grand Jury transcript *in camera* before permitting disclosure of relevant testimony therein."[8]

The motion for the minutes, after caption and title, should be in a form such as that which follows:

> "The defendant, John Jones, through his undersigned counsel and pursuant to Rule 6(e), Federal Rule of Criminal Procedure, moves this court for an order directing the United States Attorney to permit defense counsel to inspect and copy the minutes of the grand jury which returned the indictment presently pending against him, and the minutes of any other grand jury which may have considered the subject matter of the present case. The grounds for this motion, as more particularly set forth in the attached memorandum of points and authorities, are that the defendant has a particularized need for the minutes and that disclosures of them will not harm any substantial interest of the government. In the alternative, defendant moves for an order that the United States Attorney furnish to the defense the testimony of each grand jury witness who testifies at the trial of this case, after each such witness has given his direct testimony at trial. The grounds for this alternative motion are that the minutes are necessary to enable counsel for the defendant to make a full and fair cross-examination."

3. Allen v. United States, 390 F.2d 476 (CA DC 1968).

4. Pretrial production of the minutes is often denied by the motions judge on the ground that the matter would be decided by the trial judge. This problem does not, of course, arise in assignment jurisdiction, *i.e.,* those in which a case is sent out to a particular judge shortly after indictment. There is, of course, no reason even in a master calendar jurisdiction why a grand jury minutes motion is any different from a discovery motion, which is almost always decided prior to trial.

5. Note 1 *supra.*

6. United States v. Youngblood, note 2 *supra*; Allen v. United States, note 3 *supra*; National Dairy Products Corp. v. United States, 384 F.2d 457 (CA8 1967); Cargill v. United States, 381 F.2d 849 (CA10 1967), *cert. denied,* 389 U.S. 1041 (1968). There have been a number of useful district court cases as well, among them United States v. Baker, 262 F. Supp. 657 (D. D.C. 1966).

7. United States v. Baker, *supra.* In arguing for the minutes, it is perhaps useful to analyze the factors which the Court found important in *Dennis,* 384 U.S. at 871-74. In *Dennis,* the "importance of preserving the secrecy of the grand jury minutes [was] minimal," 384 U.S. at 872, and it will be minimal as well in the typical draft case, since the witnesses before the grand jury are usually selective service officials and law enforcement officers who have no reason to fear reprisal for their testimony and who testify as part of their duties of office. *See* Allen v. United States, 390 F.2d at 482. Moreover, selective service defendants have not, as a class, shown a proclivity to commit reprisals upon grand jury witnesses, so the various reasons adduced for keeping the minutes secret in Justice Brennan's dissent in Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 405 (1959), are not applicable.

Second, the witness who testifies before the grand jury will likely be a "key" witness, without whose testimony "the charge could not be proved. . . ." *Dennis,* 384 U.S. at 872.

Third, the testimony may contain "conversations and oral statements," and be "largely uncorroborated." Particularly in cases involving a dispute over allegedly prejudicial board conduct, or in complex draft conspiracy cases, testimony concerning extrajudicial statements of the accused attain great importance, and as noted in *Dennis,* 384 U.S. at 872-73. "Where the question of guilt or innocence may turn on exactly what was said, the defense is clearly entitled to all relevant aid which is reasonably available to ascertain the precise substance of the statements."

Next, the witnesses before the grand jury will often be persons with an interest in the outcome of the case – government employees or informers. This, said the Court in *Dennis,* is important in assessing the defendant's need for the minutes. 384 U.S. at 873.

8. State of Washington v. American Pipe & Construction Co., 41 F.R.D. 59, 63-64 (S.D. Calif. 1966).

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¶ 2208. Raising Constitutional Issues Prior to Trial

The need to raise constitutional points and to preserve them through appropriate objections and motions is a matter of settled law and practice.[1] But there is no hard and fast rule as to whether such issues should be raised by motion prior to trial or at the trial itself. In part, the decision will turn upon the tactical considerations discussed at ¶ 2201 *supra.* In part, it will depend upon whether a jury trial is waived or not, for a trial to the court provides a forum in which questions of "law" and "fact" can be mixed as they cannot before a jury. On the other hand, important constitutional issues may give an air of drama and moment to a case, and make it the more appropriate for jury determination. Finally, the closer a constitutional issue is to the heart of the defense on the facts, the more advisable it is to defer presenting it until the trial, when its importance will speak for itself in the context of the trial events.

Arguments such as the constitutionality of conscription, the legality of the war in Vietnam, or the constitutionality of Selective Service procedures of general application, are perhaps best raised prior to trial by motion, with a request that a hearing be held if necessary to develop the facts. See ¶¶ 2301-78 *infra.* During trial, the pressure of time and of making tactical decisions may lead to abandonment or relatively ineffective presentation of these broad-gauge issues. The trial court may be more willing, prior to trial, to engage in inquiries not central to the factual issues in the case, and not involving the same witnesses and evidence that will be before the court at the trial of the general issue.

Other constitutional issues -- a first amendment claim, for example -- may be raised by an attack upon the failure of the indictment to state an offense which the first amendment permits the government to prosecute. To take a simple example, suppose that indictment charges that the defendant did aid, abet and counsel a number of persons to refuse service in the armed forces. If the indictment stops there, it is subject to a motion to dismiss for vagueness and failure to set forth sufficient facts. But even if it goes on to describe the manner in which he allegedly counseled, it may be possible by analyzing its allegations to show that they sweep within them constitutionally protested conduct, and that a conviction founded upon such an indictment simply could not be sustained.[2] If, however, it is clear from investigation of the facts that the government could replead and allege facts sufficient to constitute a punishable offense, a pretrial motion extensively discussing constitutional issues raised by the indictment may not be warranted. The point ought certainly to be made, but not as the main thrust of a motion to dismiss. There is, in short, no use in giving the opposition a lesson in criminal pleading. The points which might have been stressed in the motion to dismiss may be recast and used at trial as objections to the introduction of evidence and in the motion for acquittal.

In raising constitutional issues prior to trial, the attorney should not be afraid to make copious use of materials and studies on the draft. Such material may be judicially noticed,[3] and its persuasive power is un-

1. This principle was stated in Yakus v. United States, 321 U.S. 414 (1944). It is enunciated in a somewhat different way in F.R.Crim.P. 52(b), which provides that "plain error" *may* be noticed on appeal though it was not brought to the attention of the court. *See* 8 Moore, Federal Practice ch. 52 (Cipes ed. – Criminal Rules). The entire question of waiver of constitutional defenses through failure to raise them has of late been the subject of extensive reconsideration, beginning with Fay v. Noia, 372 U.S. 391, 438 (1962), Henry v. Mississippi, 379 U.S. 443, 450-51 (1965), and Brookhart v. Janis, 384 U.S. 1 (1966). Briefly, these cases restate and expand the rule that waivers of constitutional rights must be the result of the client's deliberate and informed choice, and that a defendant will not in all cases be held to his counsel's waiver. The entire question is explored in Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest,* 54 Calif. L. Rev. 1262 (1966). In general, prudence counsels raising and preserving constitutional questions.

2. Such a blending of constitutional and procedural arguments was used to good effect in the Owen Lattimore perjury case. United States v. Lattimore, 112 F. Supp. 507 (D. D.C. 1953) (dismissing indictment), *aff'd in part and rev'd in part,* 215 F.2d 847 (CA DC 1954), *new indictment dismissed,* 127 F. Supp. 405 (D. D.C.), *aff'd by an equally divided court,* 232 F.2d 334 (CA DC 1955).

3. Where a case required determination of the truth *vel non* of historical, scientific, social or economic fact, the court may take judicial notice of texts, reports, and treatises, giving them such weight as the authority of their authors and their inherent persuasiveness allow. McCormick, Evidence, §§ 325, 329 (1954). As McCormick expresses it:

> "Situations remain . . . where . . . the judge as law-maker must search for the social facts as they are in truth . . . . The courts today are coming more and more to bring into the open . . . policy questions as the basis for making law. . . . On some such questions, . . . the court might be willing to hear formal expert testimony, but its normal reliance is judicial notice. Under this process, the social, economic, and scientific data can be conveniently and cheaply presented in the briefs, or can be found by the research of the judge and his assistants. And here again, it is believed, the usual requirements for judicial notice of certainty and indisputability should not be insisted on. The reports, statistics and professional opinions which the judge relies on will be those which he thinks most trustworthy, but they will not usually be indisputable. . . . In the realm of basic 'legislative' facts, . . . certainty 'is not the destiny of man.' " *Id.* at § 329, at 707.

McCormick wrote on the eve of Brown v. Board of Education, 347 U.S. 483 (1954), with its extensive reliance upon sociological and psychological data. And in United States v. Louisiana, 225 F. Supp. 353 (E.D. La. 1963) (three-judge court), Judge Wisdom copiously cited and relied upon Civil Rights Commission reports, history books, statistical studies, articles in learned journals, and myriad other materials.

In addition, some statistical and other materials, considered as recording information necessary to aid a federal agency in its task of administering or recommending executive or legislative action, may be admissible under the federal "shopbook rule," 28 U.S.C. § 1732. There is usually no motive on the part of the compilers of such materials to misrepresent (absent the presence of factors which would lead the compiler to make a self-serving distortion of fact), as was present in Palmer v. Hoffman, 318 U.S. 109 (1943). The true rule on admissibility is stated in Pekelis v. Transcontinental & Western Airlines, 187 F.2d 122 (CA2), *cert. denied,* 341 U.S.951 (1951); Baltimore & O. R. v. O'Neill, 348 U.S. 956 (1954), *reversing* 211 F.2d 190 (CA6 1954).

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doubted. The Marshall Commission report,[4] the independent investigations of researchers in the universities,[5] and other kindred materials[6] can be useful in showing the effects of such practices as denial of the right to counsel at personal appearances, to a transcript, to bring witnesses, to confrontation and cross-examination and other procedural rights which are, historically, part of any fair procedure. See ¶¶ 2351-53.

The form of the motion will depend upon the character of the relief asked. A motion to dismiss the indictment based upon unfair procedures endemic in the selective service system may be an unorthodox method of raising such points, but there is no reason for not attempting it. If the court postpones consideration of the motion until trial, nothing has been lost. The court may agree to hear the matter not as a motion to dismiss, but as a means of determining what evidence will be admissible at trial.[7]

4. Nat'l Advisory Comm'n on Selective Service, In Pursuit of Equity: Who Serves When Not All Serve? (1967).

5. Comment, *The Selective Service System: An Administrative Obstacle Course,* 54 Calif. L. Rev. 2123 (1966), contains the results of limited field study of Selective Service procedures and performance. Note, *Fairness and Due Process Under the Selective Service System,* 114 U. Pa. L. Rev. 1014 (1966), relied for its conclusions chiefly upon reported cases.

6. *E.g.,* The Draft? (1968), a publication of the American Friends Service Committee containing contributions by a number of authorities and published in hardcover and in paperback by Hill & Wang. The book contains an excellent bibliography. *See also* the June, July and August, 1968 issues of "Current History." The legislative hearings and reports on the various draft laws are an excellent source of information. *See* Bibliography ("Legislative History"), SSLR 5021.

7. Resolution of admissibility questions prior to trial has become fashionable of late. *See, e.g.,* United States v. Berrigan, 1 SSLR 3150, 283 F. Supp. 336 (D. Md. 1968), in which the court resolved the admissibility of evidence on the Nurnberg judgment in a pretrial opinion. *See* Comment, *Pretrial Evidence Rulings in Federal Courts,* 54 Calif. L. Rev. 1016 (1966).

¶ 2209. Raising Factual Matters Prior to Trial

There is in the law of criminal procedure a general restriction on raising factual defenses prior to trial. The Federal Rules themselves contemplate that the basic issues of guilt or innocence are to be tried to a jury in plenary trial.[1] There is, in short, no motion for summary judgment in criminal cases.

However, there are some matters of fact which can be raised prior to trial by motion with affidavit annexed, and which the court will, in the interest of judicial economy, resolve in favor of dismissing the prosecution.[2] If the resolution of the issue is deferred to trial, or if it is not favorable to the defense, the same factual matter may be presented to the jury for its consideration, upon the ground that the defendant has the right to submit to the jury all disputed questions of fact bearing upon guilt or innocence.[3] There are also issues of fact which are essential to the resolution of questions essentially of law, and which can be raised prior to trial.[4]

Defenses on the merits may be best deferred to trial, there to be raised by motion for judgment of acquittal. This is so if the effect of raising them prior to trial would or might be a voluntary dismissal by the government and a new indictment returned after clearing up the procedural and substantive problems that lie in the path of the pending prosecution, perhaps after issuance of a new order to report for induction.[5]

1. F.R.Crim.P. 12(b)(1) states that any defense or objection "which is capable of determination without the trial of the general issue may be raised prior to trial by motion," contemplating deferral of defenses which involve trial of the merits to the time of trial. The rule is not free from ambiguity, and has been well-analyzed in 8 Moore, Federal Practice ¶ 12.03 (Cipes ed. – Criminal Rules). *See* ¶ 2201 *supra.*

2. For example, in United States v. Naughten, 195 F. Supp. 157 (N.D. Calif. 1961), the court dismissed an indictment for falsification of selective service certificates after finding out that the "certificates" which the government intended to introduce at trial were in reality blank forms which had somehow been purloined from the selective service system. The court held that such evidence would not support a conviction, as "certificates" meant not mere blanks but forms with the proper notations of issuance validly inscribed. The court's opinion concluded with the observation that if a mistaken assumption had been made concerning the government's proposed proof, the government might move to have the order of dismissal set aside. Thus, *Naughten* sets out one way to raise a conclusive factual issue prior to trial in a context which would not permit the government to clean up its case and relitigate. The opinion does not reflect the means by which the defendants became aware of the government's proposed proof, although the pre-1966 F.R. Crim.P. 16 was broad enough to enable them to have discovery of the blank form.

3. The court may not foreclose a jury determination of even a single element of the offense, no matter how conclusive the evidence of guilt. United Brotherhood of Carpenters v. United States, 330 U.S. 395, 408-09 (1947); Mims v. United States, 375 F.2d 135 (CA5 1967); United States v. McKinzie, 301 F.2d 880, 882 (CA6 1962); United States v. Raub, 177 F.2d 312 (CA7 1949); United States v. Gollin, 166 F.2d 123 (CA3 1948).

4. The drafters of F.R.Crim.P. 12 attempted to make clear that all defenses and objections not involving a trial on the merits would continue to be raised as formerly for determination by the judge in advance of trial. Thorough discussion appears in 2 Orfield, Criminal Procedure Under the Federal Rules 151-276 (1966). *See* ¶ 2201 *supra.*

5. Unless one's client has in the meantime become 26 years of age, or otherwise acquired a draft-exempt status, the prosecution's attempting to permit reprocessing for induction after curing the local board's procedural default is a danger which must always be kept in mind.

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Questions in the latter class include motions to dismiss on the ground that the prosecution is barred by the statute of limitations (¶ 2213 *infra*),[6] motions to dismiss upon the ground that the grand jury did not have before it sufficient facts to show that an offense had been committed, and so forth. Although such motions may require the court to make inquiry outside the bare allegations of the indictment, they are not considered improper and by the literal language of Rule 12 should not be.

6. Unless, that is, the statute of limitations question itself involves a disputed question of fact, such as an allegation by the government that the defendant's fugitive status tolled the statute. *See* United States v. Zisblatt, 172 F.2d 740 (CA2), *appeal dism.*, 336 U.S. 934 (1949). *See also* ¶ 2213 *infra*.

¶ 2210. Change of Venue—Prejudice in the District

A motion for change of venue under F.R.Crim.P. 21(a) is seldom granted. The rule provides:

> "The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in the district."

The ground rules for a Rule 12(a) motion are extensively discussed in the literature.[1] Relevant to selective service cases is only the observation that such cases aften stir community resentment and hostility, as indicated for example in *United States v. O'Brien,*[2] and such a motion deserves mention as of possible importance to the selective service lawyer.

1. Perhaps the best discussion in a textbook is 2 Orfield, Criminal Procedure Under the Federal Rules 855-95 (1966). The discussion in 8 Moore, Federal Practice ch. 21 (Cipes ed. – Criminal Rules) is too sketchy to be of much use, although it may provide a good orientation to the problem.

2. United States v. O'Brien, 391 U.S. 367, 369, 1 SSLR 3029 (1968). The Court recounts that at the time of his card-burning demonstration, O'Brien and his companions had to be rescued from an angry crowd.

¶ 2211. Change of Venue—Rule 21(b)—Forum Non Conveniens

F.R.Crim.P. 21(b), as amended in 1966, provides:

> "For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district."

This provision, which is borrowed from the transfer of civil cases forum non conveniens provisions of the Judicial Code, 28 U.S.C. 1404a, is of great potential importance in draft litigation. It should be recalled that venue choices in draft cases are often largely technical, having to do, for example, with the place at which the defendant was ordered to report,[1] which may be distant from home and family. The sixth amendment requires that the prosecution be commenced in the state and district in which the crime was "committed," which means the district in which there was an act of refusal or omission to perform a duty.[2] In the latter case, the defendant need never have even been in the district--all that is required is that he was validly required to perform some duty there.[3] His home, family, friends, and work may be a continent away from the district in which the indictment is returned. It was precisely this situation that Rule 21(b) was designed to meet.

It presupposes that the defendant is for his own benefit willing to waive trial in the district ascertained by law to be the place where the crime was committed. He does this by moving for transfer. He is permitted to transfer if he can show that the balance of convenience is in his favor. Rule 21(b) is designed, in short, for the situation in which the sixth amendment venue provision conflicts with "the historic policy" of permitting a "defendant to be tried where he lives and where his defense will be most convenient for him."[4] The notes of the Advisory Committee on the Criminal Rules,[5] in explaining the purpose of the amended Rule 21(b), cited authorities clearly stating that the rule is to be interpreted with a liberality befitting its

1. Johnston v. United States, 351 U.S. 215 (1956).

2. *See Johnston, supra* note 1; Travis v. United States, 364 U.S. 631 (1961), holding that the proper venue for a prosecution for mailing a false NLRB affidavit from Colorado to Washington, D.C., is Washington, D.C.

3. *Johnston, supra* note 1. *Johnston* casts doubt upon the authoritativeness of the cogent argument made in United States v. Chiarito, 69 F. Supp. 317 (D. Or. 1946), which held that where the defendant had never been in the district, venue could not be laid there merely upon the showing that he was ordered to proceed there to perform a duty under the Selective Service law. The reasoning of *Chiarito* repays study, for it may be used in an attempt to overturn the rule in *Johnston.*

4. Wright, Proposed Changes in Federal Civil, Criminal and Appellate Procedure, 35 F.R.D. 317, 329 (1964), cited with approval by the Advisory Committee on the Criminal Rules, 39 F.R.D. at 185.

5. The Committee's notes are reprinted in many places, including the 1967 pocket part to U.S.C.A. and at 39 F.R.D. 185.

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purpose.[6] In assessing venue motions under Rule 21(b), courts are to recall that the government has prosecutorial resources all over the United States, while a defendant is often greatly inconvenienced by all but one or two possible forums.[7] Particularly in a refusal of induction case is this so. The prosecution's case is typically a skeleton affair, with only the clerk or a member of the local board testifying, plus perhaps an induction station officer. The defense may wish to put on not only the defendant but others to attest to his character, reputation and so forth, and these witnesses typically reside near the defendant's present home.

In moving under Rule 21(b), the factors of convenience to parties, convenience to witnesses, and the "interest of justice" should be separately analyzed. The last of these is an appropriate frame of reference for discussing the policy of trial in the vicinity of one's home or work which the rule is designed to protect. The form of the motion, subject to variation to conform to local rules, is as follows:

> "John Jones, through his undersigned counsel and pursuant to F.R.Crim.P. 21(b), moves this Court for an order transferring the pending prosecution [as to him][8] [as to Counts 1 and 2][9] to the District of . The grounds for this motion, as set forth in the annexed affidavit of counsel and memorandum of points and authorities, are that the defendant and his witnesses reside in the District of , that it would be unreasonably expensive for the defendant to bring himself, his family, and witnesses to the District of for the trial, and that it would be in the interest of justice to transfer the prosecution."

The memorandum of points and authorities should take up each point--convenience of parties, convenience of witnesses, and interest of justice--separately. Alternatively, counsel may wish to follow the analysis of one or another of the transfer cases point by point, to show the similarity between his case and the case he uses for analysis.[10]

The affidavit of counsel should set out the factual basis for the transfer, drawing together all that counsel knows about the expense of trying the case in the indicting district and setting out, on information and belief, the other information which he wishes to bring to the attention of the court.

6. The Committee was particularly concerned with the result in *Travis, supra* note 2. It was moved to action by the Wright article cited in note 4 *supra*, and by the cogent analysis in Barber, *Venue in Federal Criminal Cases: A Plea for Return to Principle*, 42 Tex. L. Rev. 39 (1963), cited 39 F.R.D. at 185. The "principle" referred to by Barber is the historic one of permitting trial in the "vicinage," which in days less complex than our own generally meant both the defendant's home and the place where the offense occurred. Now, however, those places may be very far apart. Good cases stating the principle of trial near a defendant's home are Hyde v. Shine, 199 U.S. 62 (1905); United States v. Johnson, 323 U.S. 273 (1944) (Frankfurter, J.); United States v. Cores, 356 U.S. 405 (1958). In *Hyde*, the Court said: "To require a citizen to undertake a long journey across the continent to face his accusers, and to incur the expense of taking his witnesses, and of employing counsel in a distant city, involves a serious hardship, to which he ought not to be put if the case can be tried in a court of his own jurisdiction." 199 U.S. at 78. In *Johnson*, Justice Frankfurter wrote for the Court: "Questions of venue . . . are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than disrespected, construction should go in the direction of constitutional policy. . . ." 323 U.S. at 276. Frankfurter was addressing the problem of venue under the Federal Denture Act, and his discussion was preparatory to construing the Act to forbid trial at a distance from the defendant's home. The government had urged that the Act be construed to permit trial in any district through which an offending denture had passed.

7. The point is made in Wright, *supra* note 4, at 329. Moreover, although the language of Rule 21(b) is drawn from 28 U.S.C. § 1404a, cases denying transfer under the latter provision should not be conclusive. Section 1404a must be construed in harmony with the federal policy of "plaintiff's choice," which gives considerable weight to the forum plaintiff has selected. Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955); SEC v. Harwyn Publishing Co., 232 F. Supp. 274 (S.D. N.Y. 1964). Rule 21(b), on the other hand, is designed to protect defendants' rights.

8. Rule 21(b)'s authorization that a defendant may move for transfer "as to him" clearly envisions transfer of a multi-defendant indictment as to the movant only, even if a severance is required. Advisory Committee Notes, 39 F.R.D. at 185; United States v. Jessup, 38 F.R.D. 42 (M.D. Tenn. 1965) (decided under former Rule 21(b)). As stated in Annot., 86 A.L.R.2d 1337, 1353 (1960), construing former Rule 21(b):

> "With respect to severance of defendants, it has been recognized that Rule 21(b) permits the court to act upon the motion of any one defendant or any number of defendants and to order a severance of parties defendant."

9. Severance of counts is also possible, and it was held under former Rule 21(b) that a defendant may move for transfer of the indictment as to only some of its counts, even if that will mean that he stands trial on part of the case in one forum and part of the case in another. United States v. Choate, 276 F.2d 724, 86 A.L.R.2d 1337 (CA5 1960).

10. Analysis of the factors one by one permits discussion of relevant authorities under convenient subheadings. Under the heading "convenience of witnesses," cases decided under the analogous provisions of 28 U.S.C. § 1404a may be helpful. Graphic Realty & Discount Co. v. Home Fire & Marine Insurance Co., 193 F. Supp. 421 (D. Mass. 1961); Anthony v. RKO Radio Pictures, 103 F. Supp. 56 (S.D. N.Y. 1951); Huck Mfg. Co. v. Townsend, 101 F. Supp. 530 (W.D. Pa. 1951); Wilson v. Ohio River Co., 234 F. Supp. 283 (W.D. Pa. 1964) ("The overwhelming number of witnesses is more convenient to Huntington, West Virginia. The factors favoring the libellant in retaining the case in this jurisdiction cannot outweigh these conveniences.") Under the heading "interest of justice," it may be possible to point to facts about the jurisdiction which make it inhospitable to the defendant. Included among these would be a jury selection system which produces juries not sympathetic to selective service law problems, and the possible advantages of having a "hometown" jury to evaluate the defendant's credibility and demeanor, as well as the credibility of his "hometown" draft board. In considering the convenience of the government, stress should be laid upon the ubiquity of the government's prosecutorial resources. Wright, *supra* note 4, at 329. In discussing the convenience of the defendant, the expense of gathering his witnesses, including character witnesses, and of living in the forum city during trial should be dealt with. In addition to the cases cited in note 6 *supra, see* United States v. Amador Casanas, 233 F. Supp. 1001, 1003 (D.D.C. 1964) (Holtzoff, J.) (decided under former Rule 21(b)).

Another means of approach is to use cases decided under former Rule 21(b) and to adopt the point analysis of significant factors dictating transfer. The leading cases are Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240, 243-44 (1964), and United States v. National City Lines, 7 F.R.D. 393 (S.D. Calif. 1947).

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¶ 2212. Search and Seizure

Federal Rule of Criminal Procedure 41(e) requires that, in most cases, objection to illegal search be made before trial. A motion to suppress may even be made prior to the return of an indictment. There are few search and seizure problems in the typical selective service case; however, three which have arisen deserve comment. They are (1) the use of a motion to suppress illegally-seized evidence to narrow the issues in the case, (2) the problem of illegal electronic surveillance, and (3) the use of a motion to suppress to raise denial of procedural rights in the Selective Service System.

Use of a motion to suppress to narrow the issues was the technique used (perhaps without defense counsel being aware that was what he was doing) in *United States v. Coffman.*[1] In *Coffman*, government agents seized a large body of literature allegedly bearing upon a plan to encourage draft evasion and resistance. The court ordered the literature suppressed, holding that it was of no conceivable relevance to the prosecution, having rather to do with general ideological opposition to war and to the draft. By this means, the prosecution was rebuffed at an early point in time, whereas otherwise the objections would have had to be made at a later point. This technique can be used whenever it is likely that a motion to suppress, before or after indictment, will serve to narrow the issues or even conclude the case.[2] Such a result may obtain when the search is technically defective or when it has cast too wide a net in the sense that it is too broad in scope.[3] Regardless of the fate of the mere evidence rule,[4] it should still be possible to suppress evidence having no relation to any possible prosecution.[5]

The form of a motion to suppress can be relatively simple. It should state the grounds upon which relief is to be sought, and have annexed a memorandum of points and authorities. It must also contain an affidavit setting forth the facts, and this affidavit should be on information and belief and subscribed by counsel. If possible, counsel should avoid using the defendant as a witness on the hearing of a motion to suppress, because of the danger that impeachment material will be generated by the prosecution on cross-examination.[6]

The second important search and seizure problem is that of illegal electronic surveillance, the scope of which is as yet unknown, although it has turned up in a surprising number of cases having "political" overtones.[7] Exploration of a surveillance issue in an adversary hearing may show that the prosecution is the fruit of the illegality, and in any case will be of advantage in probing the government's evidence.

The government has the duty to admit the presence of illegal surveillance on application by the defense for disclosure of it. This is the implicit premise of *Kolod v. United States*[8] and was admitted by the Solicitor General to be the government's burden.[9] Whether thereafter the illegally-overheard material may be turned over to the trial judge for a preliminary review *in camera* is not yet resolved. If the judge reviews the material *in camera* and orders further proceedings in the nature of adversary inquiry, the procedure is the same as in any other suppression case: the fruits of the illegality are turned over to the defense, inquiry is made of the agents who conducted the surveillance, and the leads gained from it are traced through the various government files into which they were placed.[10] The question is whether the prosecution's evidence is so far removed from the illegality as to purged of the taint.[11] It is not only illegally-seized evidence itself which must be suppressed and prevented from use, but leads gained from that evidence. The remedy to be sought in the hearing is suppression of the illegal evidence.

Relief under the Solicitor General's *Kolod* policy should be sought by means of a motion for disclosure of electronic surveillance with a supporting memorandum indicating why it is possible or likely that one's

1. 50 F. Supp. 823 (S.D. Calif. 1943).

2. It should be noted, however, that the Crime Control Act of 1968, Pub. L. 90-351, amends 18 U.S.C. § 3731 to provide that the government may take an appeal from an order sustaining a motion to suppress evidence.

3. *See, e.g.*, Stanford v. Texas, 379 U.S. 476 (1965).

4. *See* Warden v. Hayden, 387 U.S. 294 (1967). *Compare* F.R.Crim.P. 41(b); 18 U.S.C. § 3103a, as amended by Pub. L. 90-351.

5. Stanford v. Texas, *supra* note 3, collects the cases. Again, this *Manual* is an inappropriate place to restate the law of search and seizure.

6. *See* United States v. Baker, 262 F. Supp. 657, (D.D.C. 1966). *Compare* Jones v. United States, 362 U.S. 257 (1960). *Cf.* Harrison v. United States, 392 U.S. 219 (1968).

7. *See, e.g.*, Motion for Continuance, filed April 1968, Attorney General v. W.E.B. DuBois Clubs of America, No. 127-66 (Subversive Activities Control Board, pending), asking that the hearing be continued pending resolution of the electronic eavesdropping case of Kolod v. United States, 390 U.S. 136 (1968) on the government's motion to modify the cited opinion. The motion impliedly concedes electronic surveillance in the *DuBois Clubs* case. There has been a rash of cases in the Supreme Court in which the government has come forward to concede that illegal electronic surveillance was conducted. *See* Hoffa v. United States, 387 U.S. 231 (1967). For a description of one such surveillance, *see* United States v. Baker, 262 F. Sup.. 657 (D. D.C. 1966).

8. 390 U.S. 136 (1968).

9. Motion to Modify the Order of the Court, Kolod v. United States, No. 133, October Term 1967, filed January 1968.

10. For an admirable discussion of the scope of a suppression hearing, *see* United States v. Coplon, 185 F.2d 629, 636 (CA2 1950).

11. *See generally* Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Calif. L. Rev. 579 (1968).

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client has been eavesdropped upon and setting out the relevant authorities.[12]

The third problem has to do with the extensive use of registrants' extrajudicial admissions in the prosecution of selective service cases. The board clerk's version of the personal appearance is often put into evidence in one form or another. One means to raise the denial of the right to counsel--and of the privilege against self-incrimination--would be to move to suppress statements of the registrant contained in his selective service file which might be harmful to the defense at trial. However, it should be emphasized that this tactic is calculated to have little more success than attacks upon denial of counsel made in other procedural forms, although the relevance of the right to counsel in a personal appearance which winds up being at issue in a criminal case is perhaps more apparant than in the abstract.

12. The motion may be in standard from. Generally, it should contain a statement of why it is likely that one's client has been eavesdropped upon. It may be helpful to inform the United States Attorney that you plan to file the motion, and if you have been in contact with the Justice Department, to inform them as well. Often the government will, when approached, volunteer an answer to such a motion without putting up any resistance. The rationale for motions to disclose is contained in Brief for Petitioners, Kolod v. United States, No. 133, October Term 1967, available in facsimile from SSLR. (12 pages).

¶ 2213. Statute of Limitations

Since the date of the alleged offense will appear on the fact of the indictment, a motion to dismiss the prosecution as barred by the statute of limitations may be made prior to trial. The statute of limitations for selective service offenses is five years, see 18 U.S.C. §3282, but the statute is tolled as to any person who is a fugitive from justice during the period of his fugitivity. Since many selective service duties are "continuing" in nature, difficult problems sometimes arise in construing the provisions of 18 U.S.C. §3282. These difficulties are discussed below in the context of refusal to register prosecutions. See ¶ 2504 *infra*.

4. Trial

¶ 2251. Trial––Generally

After resolution of the pretrial motions, a trial date will be set. There are two systems of calendaring in use in multi-judge federal district courts: an assignment system and a master calendar system. Under an assignment system, each case is given to a particular judge for the duration of its stay in district court. In some districts, it is the practice to return each indictment to a particular judge. In others, indictments are returned and then sent out to particular judges on a rotating basis.

In master calendar jurisdictions, the usual practice is to send a case out for argument on motions to any judge sitting in a criminal part of the court, based on the state of each judge's calendar. On the day set for trial, the case is sent out to first judge who is free. Even in such jurisdictions, however, local district court rules often provide for assignment of a case to a particular judge for all purposes, although this procedure is usually reserved for "big" cases.

The 1967 amendments to § 12 of the Act also present a problem of trial scheduling. They require that draft cases be advanced on the docket for "immediate hearing."[1] This provision is not uniformly honored, and the busy schedules of judges and United States Attorneys makes it of marginal practical effect in many jurisdictions. Its presence may mean, however, that defense counsel will need to have in mind good arguments in asking sufficient time to prepare.

The discussion below singles out some special problems the lawyer faces in the typical selective service trial.

1. Prior to 1967, this provision applied only to "trial of cases arising under this title," and then only upon the "request of the Attorney General." The House version of the 1967 amendments initiated the change, upon the stated ground that "it appears that the Attorney General is reluctant to use this authority." H.R. Rep. No. 267, 90th Cong., 1st Sess., p. 30 (1967).

¶ 2252. Educating the Judge

Many trial judges in the United States have never tried a draft case. Many of those who have are impatient with draft defendants. These two problems must be countered. The first of them must be constantly in mind when making motions and in oral argument. The attorney should begin with elementary concepts,

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and then work into the more complex of his arguments. Tactically, it is wise to point out that the main lines of decision in the bulk of selective service cases have been marked out by the Supreme Court in a series of cases: *Estep*,[1] *Dickenson*,[2] *Sicurella*,[3] *Simmons*,[4] and *Seeger*,[5] standing respectively for the "basis in fact" test, the need for solid evidence to provide a basis in fact, the problem of an improper basis in law for the board's action, procedural error, and the redefinition of the substantive and procedural law of conscientious objection. Other Supreme Court and lower court cases can be worked in after the fundamentals are covered. The aim is to convince the judge that some well-settled principles are violated in your client's case, and then to move on to points having less ground in settled law, portraying them as marginal working out of the principles discussed earlier in the brief or oral argument.[6]

The second point, the impatience of the judge, can be countered in many ways. If he is a "reading" judge, work in reference to the Marshall Commission report and to other works on the due process problems of the draft. Have extra copies to offer the court for its work on the case. If the judge is not likely to read such materials, then one's argument can be put into a broader selective service context by reference to such works.

A part of educating the judge is to let him get to know the defendant. The trial memorandum is a good way, see ¶ 2253 *infra*, and an opportunity may arise in pretrial motions. If the defendant has filed articulate statements of position with his local board, and these statements are relevant, copies can be attached to the moving papers or trial memorandum.[7] Given the complexity of selective service cases, it may be wise to have a pretrial conference with the judge to line out the major issues.[8] This provides another opportunity to bring the judge around to counsel's point of view.

1. 327 U.S. 114 (1946). The earlier case of Falbo v. United States, 320 U.S. 549 (1944), is often cited as the genesis of much selective service authority. But the wisest course is to regard it as virtually overruled by *Estep. See* ¶ 2454 *infra*. Granted, *Falbo* did not take the "last step" of reporting to the civilian work camp (the equivalent of reporting for but not submitting to induction), and therefore his case is distinguishable from that of *Estep*. But the rationales of the two cases are utterly different: *Falbo* evinces an intention to forbid all judicial review of board orders, and was so construed in the circuit courts of appeals after it was decided, *Estep*, 327 U.S. at 138 n. 1, 139 (Frankfurter, J., concurring); *Estep* takes a strong position upon the need for judicial review and bristles with the suggestion that the Act might very well be unconstitutional if it were construed to preclude judicial review in a criminal prosecution. 327 U.S. at 120. *See also* Hart & Wechsler, the Federal Courts & the Federal System 322-24 (1953). The point is that *Falbo* does not advance analysis and may retard it, for it can lead one into a theoretically fascinating but inordinately complex debate over Congressional power to preclude all judicial review. *See* Petersen v. Clark, 285 F. Supp. 693, 1 SSLR 3132 (N.D. Calif. 1968), which cuts the Gordian knot. On judicial review in failure to report cases, *see* ¶ 2454 *infra*.

2. Dickinson v. United States, 346 U.S. 389 (1953), discussed at ¶ 1075 *supra*. *See also* United States v. Washington, 392 F.2d 37, 1 SSLR 3008 (CA6 1968), which explains the *Dickinson* holding.

3. Sicurella v. United States, 348 U.S. 385 (1955), cited and discussed at ¶ 1039 *supra*. *Sicurella* holds that an erroneous legal premise invalidates the classification decision of an appeal board, and by inference a local board as well. It is therefore the leading case on "error of law" as a basis for claiming invalidity of board action.

4. Simmons v. United States, 348 U.S. 397 (1955). *See also* Griffiths, Punitive Reclassification of Registrants Who Turn In Their Draft Cards, 1 SSLR 4001, 4003 n. 16 (1968), and accompanying text. Simmons holds that a procedural error by the Selective Service System invalidates its classification decision, and is notable for holding that a registrant need not show that denial of a fundamental procedural right was actually prejudicial. The rule in *Simmons* has not been taken this far in other cases. *See, e.g.*, Knox v. United States, 200 F.2d 398 (CA9 1952) (nonprejudicial denial of procedural right is no basis for invalidating board action); United States v. Freeman, 388 F.2d 246, 1 SSLR 3012 (CA7 1968) (at trial, government must show "beyond a reasonable doubt" that registrant was not prejudiced.

5. United States v. Seeger, 380 U.S. 163 (1965), is a seminal case in the development of conscientious objector law. *See* ¶ 1036 *supra*. But, perhaps more significantly, it undermines the dictum in Witmer v. United States, 348 U.S. 375 (1955), that since the issue in a conscientious objector case is the registrant's sincerity (a subjective fact), "any fact which casts doubt upon the veracity of the registrant is relevant." 348 U.S. at 382. This dictum, and the tone of the *Witmer* opinion, led to the inference by many that the "basis in fact" requirement was less stringent in CO cases than in other cases. The contrary is true, it appears from a careful reading of *Seeger*: "In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight." 380 U.S. at 184. *See* ¶ 1038 *supra*.

6. Argument in selective service cases will often rest upon a working familiarity with the law of one's own district and circuit. Upon a number of propositions of selective service law, the rules vary among the circuits. For example, the late-raised CO claim is considered most favorably in the Second Circuit, while the mandatory reopening requirements of cases from the Second, Seventh and Ninth Circuits is strongest. *See* cases cited ¶ 1096 n. 3 *supra*.

7. Copies will be available in the defendant's selective service file.

8. The wisdom of pretrying a selective service case – or any criminal case – is debatable. If discovery has been full, so that the defense knows what the prosecution has, pretrial does not harm. If discovery has not been adequate, pretrial may only tip the defense hand prior to trial. Moreover, if any line of defense rests upon careful cross-examination of selective service officials, there is no purpose in previewing the case for the prosecution's benefit. On the other hand, matters such as admissibility of doubtful evidence and main lines of proof can be hammered out in informal conversation with the district judge in a pretrial setting, precluding long bench conferences (in the case of a jury trial), or lengthy digressions (in the case of a trial to the court). Counsel must keep careful notes of the pretrial and he may wish to have it taken down by a court reporter. If it is not taken down, he must be doubly sure to make all his points on the record for a formal ruling by the judge. A point raised and ruled on only in chambers is not likely to be available on appeal. A pretrial conference, just before trial, to discuss the defendant's trial memorandum may be helpful. *See* ¶ 2253 *infra*.

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¶ 2253. The Trial Memorandum

The trial memorandum is that creature of local custom and personal habit which in many cases is better left unfiled. In most selective service cases, it is valuable. It should not telegraph defense strategies which will rest upon cross-examination or live defense witnesses at trial. In many draft cases, however, the issues are technical and rest upon no controverted facts. The best example is a refusal of induction case tried on a straight "no basis in fact" theory, in which the central facts will be found in an analysis of the defendant's selective service file. The principle task of the lawyer in such a case is to convince the court that his analysis of the file is the correct one.

The trial memorandum should begin with a brief statement of the facts as they have been uncovered in conversations with the government and through discovery, and as they are expected to develop at trial.[1] Then, it should set out the essential elements of the offense, as the defense conceives them to be. Under each element, the memorandum should discuss the problems of proof likely to arise at trial. Recent or unreported cases, other materials not readily available to the court, and extracts from the defendant's selective service file should be attached to the memorandum.

The aim of filing a memorandum is to draw together in one place the authorities and theories that will win the case. If the memorandum is filed on the eve of trial, the government will usually not put in a countering document. If the government has filed a memorandum, the defense memorandum provides the court with an alternative way of viewing the case. The memorandum should be framed so that the judge can use it at the bench to use as a kind of guide to the trial. Able marshalling of arguments and good analysis can thus put upon the course of the trial the defense view of how the trial should proceed.

In form, the memorandum should follow local requirements, but it will, following caption and title, begin with a statement of the background of the case, then analyze the legal points to be covered beginning with those likely to arise in the course of the prosecution's case.

The trial memorandum is a good place to raise arguments which are too complex for use in oral argument, and are not likely to convince the district judge, although they will no doubt be useful in the event of an appeal. Writing them down ensures against a subsequent question as to whether they were raised in the trial court.

1. The trial memorandum is, therefore, a means of raising issues which may be discussed during the pretrial conference.

¶ 2254. Should It Be A Jury Trial?

Federal Rule of Criminal Procedure 23(a) provides that "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." This provision carries forward into the Rules the sixth amendment and Article III guarantees of jury trial. *Singer v. United States*[1] held that the provision for court approval and government consent are constitutional and mandatory. The government may not, however, unreasonably withhold its consent to the waiver of jury trial[2] and, as a practical matter, seldom does.

Most selective service cases have few issues of fact for a jury to try. Therefore, it is the custom to try them to the court alone. Usually the only jury issues in refusal of induction cases, for example, are the defendant's intent and the refusal to step forward (the latter is usually stipulated). The validity of the classification given the defendant and of the local board proceedings looking to induction are generally held to be

1. 380 U.S. 24 (1965). *Singer* rests its conclusion upon an examination of the common law history of jury waiver. At common law, an obdurate defendant was tortured until he consented to jury trial. This has never been the procedure in federal courts, however.

2. The Court's discussion of this point is worth quoting:

> "In upholding the validity of Rule 23(a), we reiterate the sentiment expressed in *Berger v. United States*, 295 U.S. 78, 88, that the government attorney in a criminal prosecution is not an ordinary party to a controversy, but a 'servant of the law' with a 'twofold aim . . . that guilt shall not escape or innocence suffer.' It was in light of this concept of the role of prosecutor that Rule 23(a) was framed, and we are confident that it is in this light that it will continue to be invoked by government attorneys. Because of this confidence in the integrity of the federal prosecutor, Rule 23(a) does not require that the Government articulate its reasons for demanding a jury trial at the time it refuses to consent to a defendant's proffered waiver. Nor should we assume that federal prosecutors would demand a jury trial for an ignoble purpose. We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial." 380 U.S. at 37.

To superimpose upon restrictive rules of reviewability the denial of jury trial on issues of fact arising in the course of review raises serious problems under orthodox sixth amendment doctrine. *Compare* United States v. Spector, 343 U.S. 169, 174 (1952) (dissent).

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questions for the trial judge to decide, although there is some question as to the validity of such a rule.[3] In other cases, such as those involving counselling refusal, false statements and conspiracy, there may be a welter of factual issues.

To be taken into account in deciding whether to waive a jury is the prevalence of longer sentences when a jury trial is demanded and the verdict is guilty.[4] Of course, the defendant may want to risk a longer sentence in order to confront the jury with the moral decision implicit in finding him guilty of violating the draft law. Defendants who want to take this position are many, and the attorney must discuss with them the implications of such a decision.

If juries in the community where the case is to be tried are uniformly harsh and conviction minded in draft cases, or are likely to be so, a trial to the court may be advisable. In general, however, it is a good idea to try a case to a jury whenever the factual issues are amenable to jury decision, as in conspiracy, false statement and counseling cases. Even if a judge expert in selective service cases and attuned to the legal problems of registrants and draft defendants is assigned to the case, a jury should perhaps be impaneled: Having a jury gives the defense "two bites," in the sense of having both judge and jury pass on essential issues. Also a judge with that experience and reputation is more likely to give jury instructions which are balanced and fair.

Even if the case has only limited factual issues, as in a typical refusal case, or even in a draft card destruction case if any jury argument can be made out on the facts, the case can be opened up to the greatest extent possible to permit the defendant to discuss his views and the basis of his case with the jury. See ¶2262 *infra.* If the case is weak to begin with, hanging the jury may put an end to it.

3. The cases are legion holding that there is no right of jury trial on the issue of "basis in fact." *E.g.,* Cox v. United States, 332 U.S. 442 (1947); United States v. Tucker, 374 F.2d 731 (CA7 1967); Tamblyn v. United States, 216 F.2d 345 (CA5 1954), *cert. denied,* 348 U.S. 950 (1955). However, in Martinez v. United States, 384 F.2d 50 (CA10 1967), the district court submitted to the jury the question of the defendant's conscientious objector beliefs. The jury's verdict was affirmed on appeal, and the court of appeals did not comment upon the issue. The way may be open to challenge the limitation on the right of jury trial. Cogent arguments are advanced in White, *Processing Conscientious Objector Claims: A Constitutional Inquiry,* 56 Calif. L. Rev. 652, 667-76 (1968), arguing that to conclude a registrant's conscientious objector claim upon the basis of an administrative determination by a three-man panel may offend the constitutional guarantee that all crimes shall be tried by a jury. Moreover, the rule that selective service system decisions are "final" unless made without basis in fact or upon the basis of an error of law, *see* ¶2253 *supra,* may be open to question as denying meaningful judicial review. *See* Petersen v. Clark, 1 SSLR 3132 (N.D. Calif. 1968), for a penetrating analysis of judicial review doctrine in a related context.

4. The New Draft Law: A Manual for Lawyers and Counselors (Ginger ed. 1967, 1968 Supp.). The practice of giving longer sentences and a constitutional critique of it are discussed in Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence,* 66 Yale L. J. 204 (1956).

¶2255. Voir Dire

Federal Rule of Criminal Procedure 24(a) gives the judge discretion to let counsel conduct the voir dire or do it himself on the basis of standard voir dire questions supplemented by questions suggested by the prosecution and the defense.[1] If the practice of the judge to whom the case is assigned is known, preparation can be made with that in mind. If the master calendar system gives no notice of which judge will try the case, then the attorney should prepare a list of voir dire questions in the form of a written motion. The refusal of the judge to ask the listed questions can then be assigned as error.[2]

The following questions, written out below in the form of a motion, are suggested as a starting point in a selective service case. It will be noticed that some questions are designed to explore general juror attitudes rather than merely an attitude toward the particular case. The question concerning prior service on a criminal jury is asked to permit the defendant to exercise one of his ten peremptory challenges against any person who has served, since a juror with prior service who voted for acquittal on one or more occasions may not be recalled (in some districts) or, if called, he may be stricken by the prosecutor based on his "jury

1. Most trial judges conduct the voir dire themselves. *See* Judicial Conference Committee on the Operation of the Jury System, *The Jury System in the Federal Courts,* 26 F.R.D. 409, 466 (1960). (This report is the source of much valuable information on the operation of the federal jury system.) So long as defense counsel is given a chance to present questions for the trial judge to ask the jury, it is not error for him to conduct the voir dire. United States v. Rabb, 394 F.2d 230, 1 SSLR 3164 (CA3 1968). It is, however, a good idea for the defense to move the court for leave to conduct the voir dire, for counsel can get the "feel" of the panel if he asks the questions himself.

2. *See* Morford v. United States, 339 U.S. 258 (1950) (error to refuse permission to counsel to ask jurors who were government employees whether the Executive Branch Loyalty Order had any effect on their ability to judge the case fairly); United States v. Dailey, 139 F.2d 7 (CA7 1943) (Jehovah's Witness refusal of induction defendant may ask jurors if they are prejudiced against JW's but not if they understand how JW ministers are ordained nor as to individual veniremen's religious beliefs). There are some older cases limiting the right to examine on voir dire concerning matters which are relevant only to peremptory challenge and not to challenge for cause, *see* 3 Orfield, Criminal Procedure Under the Federal Rules, § 24.16, at 119. But the modern view is that such questioning is permissible. *Id.* (For the sake of completeness, we note another voir dire case arising under the draft laws. In Rutherberg v. United States, 245 U.S. 480, 482 (1918), the court held it proper to rule out a voir dire inquiry whether prospective jurors knew the difference between socialists and anarchists.)

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book." The questions submitted would follow a normal caption and heading such as "Motion Concerning Voir Dire:"

"Defendant John Jones, by his undersigned counsel and pursuant to Rule 23(a), Federal Rules of Criminal Procedure, moves this Court to permit counsel to interrogate the prospective jurors concerning the following matters and other related matters, or in the alternative, to examine the jury panel as follows:

"1. Do you or any member of your family know the attorney for the United States in this case, ?

"2. Do you or any member of your family know any of the following persons who worked on the investigation of this case? [The defendant asks that the government list the FBI agents and others who worked on the investigation.]

"3. Do you or any member of your family know the following persons who are prospective witnesses in this case? [Defendant requests the court to ask the government to list the names of the witnesses whom it intends to call for the purposes of examining the jurors to see if any of them or any members of their family know the witnesses.]

"4. Do you or any member of your family know any employee of the Federal Bureau of Investigation?

"5. Do you or any member of your family know anybody who works for the United States Department of Justice, or as a prosecutor?

"6. Have you heard or read anything about this case, in which the defendant is charged with ---- ----? If so, how did you gain this knowledge? Through newspapers and magazines? radio? television? discussion with family, friends or acquaintances?

"7. Have you ever heard anyone else express an opinion about the defendant, John Jones, or about this case?

"8. Have you ever in any place or at any time expressed an opinion about the defendant or about this case?

"9. If you sit on the jury in this case, under your oath as juror, you will be required to focus your attention exclusively on the charges brought in the indictment here and the evidence offered by the prosecution and the defense and received in this courtroom. Do any of you feel that you will be unable to judge the facts of this case solely upon the basis of the evidence presented here in this courtroom and in accordance with the instructions of the law given by the court?

"10. Do you, or does any member of your family, know anybody who is or has been a member of the military? Have any of you been in service? [If yes, give details: rank, theater of service.]

"11. Have you ever served on a criminal jury? If so, how many times?

"12. Have you ever been a witness for the government before a grand jury, or in the trial of a criminal case?

"13. Would any of you place greater credence, or give greater weight, to the testimony of government agents or employees as contrasted with the testimony of persons not employed by the government?

"14. Specifically, would you place greater credence in, or give greater weight to, testimony of members of the Federal Bureau of Investigation, or the Metropolitan Police, or the military, than to the testimony of persons not so employed?

"15. Are you an employee of the United States government? If so, would you feel in any manner embarrassed in your employment or with your superiors if you were to return a verdict for the defendant, considering that the government is a party to this action?

"16. Are any of you a member of or affiliated in any way with any law enforcement agency?

"17. Is any member of your family employed by or affiliated with a law enforcement agency?

"18. The law provides that any person who, by reason of his religious training and belief, is opposed to participating in war, does not have to serve in combat duty in the armed forces. Such persons are assigned to be, for example, medical personnel in the military, or if they are found to be sincerely opposed to participating in noncombatant duty such as that, they are assigned to perform two years of civilian work contributing to the national health, safety and interest. Would any of you think less of somebody who claimed to be opposed to participation in war than of somebody who went into the military in a combatant status?

"19. There has been a great deal of publicity lately about the draft laws, and about criminal prosecutions of persons who are supposed to have violated the draft laws. Have you read anything about any of these cases? Have you expressed any opinion about any draft law cases? If so, what were the circumstances?

"20. Is your state of mind such that you are opposed to or find any fault with the following basic principles of our law:

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"a) The indictment is merely a charge. It is proof of nothing and no unfavorable inference may be drawn against a person because he is charged with a crime.

"b) Anyone accused of crime is presumed innocent, which presumption continues even while the jury deliberates and entitles a defendant to be acquitted unless the jury finds that his guilt has been established beyond a reasonable doubt.

"c) The burden is at all times upon the prosecution. Defendant has no burden of offering proof or of testifying in his own defense, and, even if he does not, no unfavorable inference may be drawn against him.

"d) A defendant must be acquitted unless his guilt is established beyond a reasonable doubt by reliable, believable proof and not upon suspicion, guess or conjecture.

"e) If your state of mind is such that you are opposed to any one or more of the basic principles of law (Nos. a-d), can you completely put aside and remove from your own concept of the law and accept the court's instructions on the law in its entirely unbiased and unaffected by your previous concepts?"

¶ 2256. Opening Statements

The prosecutor will make his opening statement, tailoring it to fit the judge or the jury. Most judges, although they are not required to do so,[1] will permit defense counsel to reserve his opening statement until the commencement of the defense case. Whether to reserve is a difficult question, but counsel should be prepared to open on the first day of trial. If government counsel's opening is well-done and appears to leave open no possible means by which the defendant could be found not guilty, then defense counsel should consider opening immediately following the prosecutor, to let the jury know the major issues from the defense point of view and to give a foretaste of defense cross-examination strategy.

In his opening, the prosecutor should be confined to setting out the essential elements of the offense and indicating the manner in which he expects to prove them.[2] In the defense opening, the same rules apply. However, if it is necessary to give the jury some preview of the broader issues posed by the defense, counsel can stray beyond the strict outlines of his proposed proof. If the defendant is to be a witness, the defendant's testimony should be alluded to as well. If the defense plans to present a witness who is particularly vulnerable to a well-prepared cross-examination, counsel may wish to omit mention of that witness or of facts which would suggest his identity. There is great leeway, so long as the statement is confined to what the defense expects to prove and so long as what the defense expects to prove is material and relevant. It is possible to make some argument in the course of the opening, provided the argument is couched as "what the proof will show."

In sum, the purpose of the opening is to prepare the jury for what will unfold before it, and to place that evidence in the context of the issues of the case. The opening should be scrupulously prepared, to make sure that there are no overstatements. Understatement is, indeed, the key. The opening should be logical and should lead the listener to the natural conclusion that, if the defense can do all that it claims, the defendant must not be found guilty. If the opening cannot fulfill those promises, it is better to waive it, with the statement that the evidence will speak for itself. If an opening is waived, the first witness should be the one who will speak to the broad issues in the case or who will provide a backdrop for the rest of the case. Usually this will be the defendant.

1. United States v. Conti, 361 F.2d 153 (CA2 1966).

2. Leonard v. United States, 277 F.2d 834 (CA9 1960) (statement should be limited to facts government intends to prove and should not contain an attack on defendant's character); McFarland v. United States, 150 F.2d 593 (D. D.C. 1945) (statement that defendant "lied his way into the Marine Corps" unfair and prejudicial). The prosecutor's opening is usually held to be only an outline of what he must prove and the defendant is not generally entitled to a directed verdict on the opening. Rose v. United States, 149 F.2d 755 (CA9 1945); McGuire v. United States, 152 F.2d 577 (CA8 1946); United States v. Levine, 372 F.2d 70 (CA7), *cert. denied*, 388 U.S. 916 (1967). But these cases recognize that a directed verdict might be ordered in exceptional circumstances. If the prosecutor refers to a piece of evidence in his opening and describes it inaccurately, it has been held that he has an obligation to correct the misimpression thereby created. Reeves v. Warden, 346 F.2d 915 (CA4 1965).

¶ 2257. Special Evidence Problems—Selective Service Records

The defendant's selective service file and other selective service documents such as appeal board docket books, minutes and so forth, are generally held admissible as business records under 28 U.S.C. § 1732, the

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federal "shop-book rule."[1] By R 1606.35, the procedure for producing the defendant's selective service file into the court is defined.[2]

In a prosecution under the Act, the System will produce the records through any employee who is near the courthouse and knows more or less what the records in question amount to. R 1616.35(a) provides that any employee who produces the records shall be considered the custodian for purposes of the trial. Generally if the prosecution of the registrant is at a distance from his local board, a representative of the State Director for the State in which the prosecution is being conducted will produce the records.[3]

It is the usual practice to subpoena local board records by a subpoena addressed to the clerk of the local board or appeal board or to the board itself. However, R 1606.63 purports to reserve to the Director the authority to release records of the System if the disclosure of the records is restricted by Part 1606.[4] It may be possible, therefore, to subpoena records directly from National Headquarters by service of a subpoena upon the Director.[5] In any case, the production of the records by the prosecution or defense is by subpoena, and an indigent subpoena is available under F.R.Crim.P. 17 if the defendant qualifies for its issuance.[6]

The provision for production of the records by someone not their actual custodian is questionable, but has been upheld whenever it has been challenged.[7] However, the challenges rested solely upon the technical requirements of the law of evidence. If counsel intends to challenge such board conduct as failing to put all the relevant information into the file, it may be possible to insist that properly qualified board officials or members appear and testify concerning custody of the file and board practices respecting it. That is, no one other than the actual custodian could testify that the file was indeed kept in the normal course of business of the defendant's board and that it was the normal course of business of that board to put into it all records of the registrant's classification and processing. No one other than the actual custodian can explain cryptic entries or say with assurance that the "open file" rule[8] is always respected.

Once the file is produced and authenticated by having its actual or surrogate custodian testify, there remains a further "shopbook" issue. The federal shopbook rule is an exception to the heresay rule,[9] and permits evidence of events to be put in by means of having a witness read out in court entries in books and records, in the present instance, entries in a selective service file. Some courts have upheld this technique in

1. 28 U.S.C. §1732(a) provides:

"In any court of the United States . . . , any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility."

§ 1732(a) goes on to define "business" very broadly, and § 1732 (b) provides for admissibility of copies of original records. § 1733 provides a broad right of admissibility of government records and minutes. The history, rationale and scope of the "business records" exception to the hearsay rules is given in McCormick, Evidence §§ 281-90 (1954).

2. R1606.35(a): "Any officer or employee of the Selective Service System who produces the records of a registrant in court shall be considered the custodian of such records for the purpose of this section."

3. He will generally order them through the office of the State Director for the state in which the registrant's board is located. *See* R1606.33.

4. R1606.35(a) provides that in a prosecution under the Act, records of the registrant-defendant shall be produced in response to a subpeona. This provision appears to override the authority vested in the Director by R1606.63 and to provide that records of a registrant may be obtained by subpeona served upon the local board. Similarly, a subpeona served upon the local board should suffice to obtain minutes of local board meetings and the board's classification record, both of which are public documents. *See* ¶1076 *supra*. However, as to such matters as the qualifications of local board members to serve, and other information restricted by regulation, R1606-.63 required that the Director approve production of the information in response to a subpeona. R1606.63 contains no substantive authority for withholding information from the public, however. It is merely a housekeeping regulation designed to centralize decision-making authority on questions of confidentiality and producibility. *See* ¶31 *supra*. As such, it is probably valid, as it follows closely the regulation upheld in United States *ex rel.* Touhy v. Ragen, 340 U.S. 462 (1951). *See* Boske v. Comingore, 177 U.S. 459 (1900), upholding a similar regulation issued by the Secretary of the Treasury.

5. If the Director alone has the power to produce records, he should be amenable to process. *See* Frankfurter, J., concurring in United States *ex rel.* Touhy v. Ragen, 340 U.S. at 472. However, it is also clear that the local official who actually has the records is also amenable to the process of the court, although the court may be willing to await word from the Director as to producibility before attempting to enforce compliance with the subpeona. *See generally* Elson v. Bowen, 436 P.2d 12 (Nev. Sup. Ct. 1967).

6. *See* ¶2206 *supra*.

7. *E.g.*, Lowe v. United States, 389 F.2d 51, 1 SSLR 3007 (CA5 1968), holding that R1606.35(a) amounts to a "law" within the meaning of F.R.Civ.P. 44(c), which by F.R.Crim.P. 27 is made the rule for determining admissibility of business records in criminal cases. To the same effect is Kariakin v. United States, 261 F.2d 263 (CA9 1958). Generally, under F.R.Civ.P. 44(a)(1), "legal custody" is defined as immediate custody. United States v. Ansani, 138 F. Supp. 454 (D. Ill. 1956).

8. *See* ¶1074 *supra* on the "open file" rule. *Compare* Uniform Rule of Evidence 63(14), which provides that an omission from a record may be evidence that facts not there recorded did not occur, provided that the other requirements of the business records rule are met. However, it should be noted that § 1732(a) expressly provides that failure to produce the entrant or maker of the record to testify with personal knowledge concerning the transaction, may be shown to affect the weight of the evidence thus offered. *Compare* Niznick v. United States, 173 F.2d 328 (CA6), *cert. denied,* 337 U.S. 925 (1949).

9. *See* Yaich v. United States, 283 F.2d 613 (CA9 1960) (business records rule excuses requirement that public official who made the record appear and testify, but does not overcome hearsay objections generally; selective service file entry inadmissible to show matters as to which the maker of the record could not have testified). *See generally* McCormick, Evidence §§ 281-90 (1954).

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proof of such conclusive facts as the failure of a defendant to report to a hospital for civilian work.[10] Such a holding seems ill-considered in light of the Supreme Court decision in *Palmer v. Hoffman.*[11] In *Palmer*, railroad company investigators' accident reports were ruled not covered by the shopbook rule because they were designed for use in litigation and did not consist of the relatively simple straightforward accounts of facts which are customarily the province of business records. The same criticism could be made of local board records, particularly when a registrant and a board are in controversy and litigation is a not unlikely possibility.[12] The defense counsel will want to analyze and protest in appropriate cases the use of business or office records as a substitute for cross-examinable testimony concerning what the board or the registrant or some third person or persons did.

When these two issues of authentication and hearsay are resolved, there come into play two further determinations, those of relevancy and those of materiality. Adopting Professor McCormick's distinction between the two,[13] some matter in the file will be "immaterial" because it has nothing to do with any issue permissibly in the case. For example, in a prosecution for refusal to submit to induction following denial of a conscientious objector claim, it has been held that it was not material to any issue that the defendant had been lax in communicating with his board about changes in status.[14]

Other records will be "irrelevant" (in the McCormick sense) because while they bear upon an issue properly in the case, they are of so little probative value in the proof of that issue that they should be disregarded. Given the federal rule that evidence, to be held relevant (probative), need only make it more likely that it would be in the absence of such evidence that the disputed proposition is true,[15] a claim of irrelevance is hard to sustain.

The use of the defendant's selective service file, affirmatively and defensively, can obviously be important. Counsel should carefully scrutinize the file to make sure that every procedural step has been complied with. He should read every item in it, looking for errors and omissions. Does the file show a quorum at every board meeting? Does it show that the board had before it some improper conclusion of law in its deliberations? And so on. The use of a "checklist" may be helpful.[16] The rule is generally that neither the government nor the defense may stray outside the file in considering such issues as "basis in fact" for a registrant's classification.[17]

10. United States v. Holmes, 387 F.2d 781 (CA7 1967), *cert. denied*, 391 U.S. 936, 1 SSLR 3084 (1968) (file entry admissible to show that defendant did not report for work, no violation of constitutional right of confrontation). The decision seems questionable. *See* note 12 *infra*. *See also* Goss v. United States, 384 F.2d 133 (CA 10 1967); Mahan v. United States, — F.2d —, 1 SSLR 3125 (CA10 1968).

11. 318 U.S. 109 (1943). *Palmer* is the leading business records case in its field.

12. The *Palmer* holding was interpreted as limited to essentially self-serving statements in Pekelis v. Transcontinental & Western Airlines, 187 F.2d 122 (CA2 1951). *Pekelis* held that records of an accident investigation were admissible *against* the employer of the maker of the records. Such a rule appears to be workable and should be adopted in Selective Service proceedings: the registrant and the government would be free to rely upon entries of a simple and straightforward, noncontroversial character. The registrant would be free to rely upon other forms and entries in the file, but the board would be required to prove by cross-examinable evidence that events of real significance on which there could be disagreement as to what actually took place. *See* Petersen v. Clark, 1 SSLR 3132 (N.D. Calif. 1968); Niznik v. United States, *supra* note 8.

13. Materiality "looks to the relation between the proposition for which the evidence is offered and the issues in the case." Relevancy looks to the tendency of the evidence offered to prove an issue concededly in the case. McCormick, Evidence § 152 (1954).

14. United States v. Thomson, 1 SSLR 3059 (D. Mass. 1967). *Compare* Silverman v. United States, 220 F.2d 36 (CA8 1955) (evidence of failure to keep in touch with local board relevant in prosecution for failure to report for induction); Pardo v. United States, 369 F.2d 922 (CA 5 1966) (semble).

15. Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285, 299 (1892).

16. An excellent checklist appears in The New Draft Law: A Manual for Lawyers and Counselors 100-100e (Ginger ed. 1967, 1968 Supp.). Counsel can make his own checklist to supplement the Ginger manual leafing through Part I of this *Practice Manual* to determine whether every procedural right there listed has been complied with. Following that, he should leaf through the article, recent decisions and newsletter sections of SSLR to determine if any decisions or other events since the publication of the *Practice Manual* have given new grounds for challenging board action.

17. *See generally* Cox v. United States, 332 U.S. 442 (1947). However, this rule is modified to permit evidence as to board prejudice material to the defendant's classification, Niznik v. United States, 173 F.2d 328 (CA6), *cert. denied*, 337 U.S. 925 (1949), or when a record of a transaction (such as a personal appearance) is incomplete, Imboden v. United States, 194 F.2d 508 (CA6), *cert. denied*, 343 U.S. 957 (1952). The rule of these cases may be stated broadly as follows: evidence outside the record is admissible to prove a fact not commonly compassed within the record's entries (board member prejudice or disqualification, for example) or to remedy an omission in the file not arising by fault of the registrant, whose duty it is to make his record before the local board. *See also* United States v. Gearey, 368 F.2d 144 (CA2 1966), remanding to the district court for a hearing on the meaning of an ambiguous local board minute entry regarding denial of Gearey's late-raised CO claim. Such a procedure, after the court had announced which interpretation of the entry would result in the defendant's conviction being upheld, seems a bit questionable. On remand, the district court found that the board had properly denied Gearey's claim, 266 F. Supp. 161 (S.D. N.Y. 1967), and the court of appeals affirmed, 379 F.2d 915 (CA2 1967), *cert. denied*, 389 U.S. 959 (1967). *See also* Boswell v. United States, 390 F.2d 181, 1 SSLR 3057 (CA9 1968), remanding to the district court for a hearing on whether the defendant was refused the chance to file a Form 150 claiming conscientious objection. If he was denied such an opportunity, the board's records would not be likely to show it.

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¶ 2258. Board Members As Witnesses

It may not be advisable to call board members as witnesses. Often, they can do little save to justify their conduct and to deny they did anything prejudicial. They may however, seek to contradict the evidence of the file as to matters such as quorums and what was said at meetings, a potentially quite helpful precursor to strong impeachment, though laden with traps for the unwary examiner. However, if a board member has made a particularly outrageous statement, for example, in the course of a personal appearance, and if it was overheard by sufficient witnesses, it may be helpful to call the board member as a hostile witness and interrogate him as to the statement.

Consider a not untypical conscientious objection case. If a board member said in the course of a personal appearance that the registrant's not being a member of a recognized "peace chruch" virtually foreclosing his CO claim, it might be wise to explore that issue with the board member at trial. The question of tactics is all-important. A prosecutor skilled in selective service law will see where the questioning leads and will seek to rescue his case be getting the member to hedge and say, for example, that he did not mean to suggest that one has to be a member of such a church, but only that it was much more difficult to judge the case when the registrant was not a member. The board member may also see the import of apparently casual questions designed to elicit answers important to the defense. In general there is little use in asking a question unless the answer is pretty clearly going to be as expected, or unless any attempt to hedge or change his story will subject the board member to heavy examination followed by impeaching witnesses so as to destroy his credibility and made the local board look bad in the process.[1]

1. There is dictum in the cases that a registrant may not probe the thought processes of board members, *e.g.*, Clay v. United States, --- F.2d ---, 1 SSLR 3088 (CA5 1968), and that in any case board error is cured by the de novo review on appeal. *Clay, supra,* is an extreme statement of this view. However, board member prejudice toward a registrant is usually held to trigger a clearcut exception to both of these principles. The registrant is entitled to a fair hearing at *all* stages of the classification process, and board hostility toward him and toward his claim deprives him of that right. United States v. Peebles, 220 F.2d 114 (CA7 1955). Niznik v. United States, 173 F.2d 328 (CA6), *cert. denied,* 337 U.S. 925 (1949). In *Niznik,* the court held that denial of a fair hearing by means of refusing to consider evidence tendered by the registrant could not be cured by de novo review on appeal. 173 F.2d at 335. The court brushed aside a government contention that the error, if any, was harmless because the registrant has the right under the regulations to include additional matter in his file and to attach to his notice of appeal any information which the board refused to receive. The court held that this regulation, now R1626.12, confers a privilege upon the registrant but does not excuse the board's failure to receive proffered information nor require the registrant, untutored in the law, to "examine and approve a record on appeal." 173 F.2d at 334. Excellent suggestions on calling and examining board members are made in Margolis, *Trying a Selective Service Case,* 26 The Guild Practitioner 100 (1967).

¶ 2259. Objections to Evidence

F.R.Crim.P.51 abolishes exceptions in federal district courts, and provides that it is sufficient for a party to make known his objection to action by the court against him, or to make a sufficient request for action by the court in his favor. The rule specifically provides that in the absence of an opportunity to object failures to do so will not prejudice a party.[1]

To be preserved for appeal, therefore, objections to evidence must be made whenever there is opportunityto do so. The objection may be made in open court or "at the bench" ("at sidebar"), depending upon the attorney's tactical decision and the judge's wishes in the matter. A simple statement "I object" or "Objection, if your Honor please," is usually technically sufficient unless the judge prefers counsel to indicate the ground of the objection. However, most counsel prefer to specify the ground of the objection, in order to make a better record and to let the jury know why the evidence is being objected to. It is preferable to indicate the ground of objection, if it is to be made in open court, in nontechnical language so that the jury sees the essential fairness of the position taken in the objection. Thus, counsel would say "Your Honor, he can't attack *his own* witness," rather than "Objection, impeaching his own witness."

Objection to line of testimony or evidence may be made after the first question is asked, and by leave of court may be made "continuing" in nature so counsel does not have to object at every question. This technique is useful when counsel wished to object to evidence on a fairly technical basis, and does not wish to prejudice his case in the eyes of the jury by continually jumping up and objecting. For example, if the government is going to put on a witness to show a film and then describe it, argument on admissibility may be had out of the jury's presence and a continuing objection noted by the court on the record. Counsel is thereby relieved from objecting after each question and can, if he wishes, behave before the jury as though he was perfectly agreeable to having the film come into evidence.

1. Gori v. United States, 367 U.S. 364 (1961), illustrates the difficulty which may arise in proving that there was no opportunity to object.

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¶ 2260. Cross-Examination of Government Witnesses

Government witnesses fall generally into four categories:

1. Custodians of records
2. System officials testifying as to substantive matters and to aspects of the defendant's contact with the Selective Service System
3. Law enforcement officers, principally Special Agents of the Federal Bureau of Investigation and Military Intelligence Agents
4. Observers who are nominally disinterested

The custodian of the selective service records may be a passive errand boy or he may be relied upon to describe, in general, the selective service process. In cross-examining him, it may be well to bring out aspects of the process which counsel intends to raise in the defense case.

In any case, it should be brought out that he has no way of knowing whether everything that is entered on the records is accurate or that everything sent in by the registrant has been placed there. He is only testifying to what the regulations require to be placed in the file. See ¶ 2257 *supra.*

2. Board members and clerks. With the file in front of them, these officials can be helpful to the defense. If the defense plans to bring out matters in the file, and omissions from it, the cross-examination of the board member or clerk is often a good way to begin. It is always better for defense counsel to bring out a fact from the mouth of a government witness than from that of a defense witness. Doing so bolsters the believability of defense evidence of the fact, heightens its importance, and gives the witness and the trier of fact the impression that the examiner knows virtually all the relevant details and is not afraid of any of them hurting his case.[1]

3. FBI agents and other law enforcement officers fall into the same category, except they are usually skilled witnesses.[2]

4. Disinterested observers. Many of these persons will be pro-government and proud of their role as government witnesses. Others of them will be literally neutral. But since the government has called them, favorable testimony from their lips has almost the same impact as favorable testimony of any other government witness.

After each witness testifies, the defense is entitled to all of the witness's prior statements for use in cross-examination,[3] and perhaps also to any grand jury testimony of the witness.[4] This material, skillfully used, can buttress the defense case.

1. An excellent example of use of the file entries to demonstrate board prejudice is United States v. Peebles, 220 F.2d 114 (CA7 1955). Defense counsel will have the file before the trial. *See* ¶ 2206 *supra.* He should carefully review it and index it by subject matter potentially useful to the defense. That is, he should make facsimile copies of every entry in the file which proves a point being advanced by the defense, so that if a given item (such as the classification record on the back sheets of Form 100) has relevance to more than one defense point, a copy of that item can be found under all subject matter headings to which it is relevant. The indexed material can be mounted in a notebook for easy use. In this way, it is possible to cross-examine the board official in rapid-fire manner on point after point, without having to shuffle through a lot of papers.

2. FBI agents and other law enforcement officers are difficult to cross-examine. Under the Jencks Act, 18 U.S.C. § 3500, the defense will be given the prior testimony of such officers (as with any government witness, *see infra*) for use in cross-examination. Some trial counsel prefer to begin by examining the witness on the Jencks materials to ensure that a complete turnover has been made. One can ask, for example, the following questions:

> "Q: With regard to this typed report, did you make any notes from which this was prepared? [Answer is almost invariably yes.]
>
> "Q: May I have those produced please. [With a look to government counsel. Result of this question is usually a bench conference and a determination that the notes have been destroyed.]
>
> "Q: Is it your practice to make notes of your surveillances [interviews] while they are going on? [Answer is almost invariably yes.]
>
> "Q: And is it also your practice to destroy those contemporaneous notes? [Answer is almost invariably yes.]
>
> "Q: Isn't it a fact that it is Bureau practice to destroy those contemporaneous memoranda? [Truthful answer is almost invariably yes.]

At this point, counsel may wish to make a motion to strike the agent's testimony, citing 18 U.S.C. § 3500(d). The odds on getting the motion granted are long, but it may be sound tactics to make it.

3. Jencks Act, 18 U.S.C. § 3500. The Jencks Act defines the material which must be produced, and established a series of sanctions for nonproduction. It was passed in response to Jencks v. United States, 353 U.S. 657 (1957). Leading cases interpreting it are Palermo v. United States, 360 U.S. 343 (1959); Rosenberg v. United States, 360 U.S. 367 (1959); Campbell v. United States, 365 U.S. 85 (1961); Campbell v. United States, 373 U.S. 487 (1963); Ogden v. United States, 303 F.2d 724 (CA9 1962) (taking a broad view of producibility under the Act); United States v. Borelli, 336 F.2d 376 (CA2 1964).

4. *See* ¶ 2207 *supra.*

¶ 2261. Motion for Acquittal

At the close of the government's case, the motion for judgment of acquittal should be made. It is often suggested that the motion be in writing, and that may be a good idea when there is time to prepare a written motion. Often, particularly in jury cases, it will be necessary to make an oral motion. Since the pretrial

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motions and trial memorandum will usually have been filed, anticipating virtually every point that will be raised, the motion, if written, need not be lengthy. All bases for acquittal should be covered, along with the general statement that the evidence is not sufficient. Detailed oral argument, to the extent allowed by the trial judge, should be made on aspects of the case in which the judge appears interested and which appear strongest.

So long as every point is spelled out clearly and taken down by the court reporter, a written motion is not necessary. Failure to make a motion for judgment of acquittal at the close of the government's case will probably not be held to waive rights to object on appeal,[1] but it is a good idea to make it in order to avoid any possible question as to whether all points regarding the sufficiency of the evidence were raised and preserved in the trial court.[2]

1. *See* Advisory Committee Notes to amended F.R.Crim.P. 29, 39 F.R.D. at 191: "A motion for judgment of acquittal may be made after discharge of the jury whether or not a motion was made before submission to the jury." The rule is, however, that failure to move for judgment of acquittal at the close of the case waives the right to have the sufficiency of the evidence reviewed on appeal. *But see* ¶ 2264 *infra.* It is a good idea to make a motion at the close of the government's evidence, however, and absolutely essential to make it when there are codefendants and one's own client does not plan to introduce any evidence in his behalf. If he makes the motion at the close of the government's case, he can under one view preserve his right to have the sufficiency of the evidence to sustain conviction determined solely upon the basis of the evidence adduced in the government's case in chief rather than upon the whole record. Cephus v. United States, 324 F.2d 893 (CA DC 1963).

2. *See generally* Comment, *The Motion for Acquittal: A Neglected Safeguard*, 70 Yale L.J. 1151 (1961).

¶ 2262. The Defendant As Witness

The defendant need not testify, but in most selective service cases should. A part of almost every defense in a criminal case is an assertion by the defendant either that "I didn't do it," or "I did do it, but there are some excusing and justifying circumstances you should know about." Usually, neither of these defenses can be put on unless the defendant testifies. Moreover, the defendant will generally be permitted to testify concerning his background, education, and work, whether these matters are relevant to the issue of guilt or innocence or not. He can do so because this information is helpful to the jury in assessing his veracity and his character generally, which he puts into issue by taking the stand and testifying.[1]

The liberality generally accorded the defendant testifying means that matters not otherwise admissible may come in for the purpose of upholding the defendant's character or for the purpose of explaining his intent. For example, a defense based upon the illegality of the war the defendant is being asked to fight in may be ruled out of evidence, yet the defendant may be able to discuss the war in terms of his own life, as bearing upon his character and intent.[2]

Most defendants, however, are totally unaware of the limits upon admissibility of testimony and of the manner in which they ought to testify. They are also, though articulate, not aware of the manner in which their stories should be cast in order to acheive maximum jury impact. Finally, selective service defendants whose acts rest upon principle are often so remorselessly honest that they are impelled to place all their doubts and all the unfavorable evidence about themselves first, in order to ensure they are being "fair". All of these elements must be dealt with by counsel, by carefully preparing the defendant to testify. It will be up to counsel whether to use the question-and-answer or narrative form of direct examination, subject of course to the control of the trial court. But the story should be refined and refined to make maximum impact on the trier of fact. The defendant should also be cross-examined before trial by his own counsel along with someone else who will listen to the proposed direct then attack it. The mock cross-examination should be more scathing than the real cross-examination will be, and should be broader in scope than the real cross-examination is likely to be. The purpose is to make the defendant as relaxed as possible when he takes the stand, and to impress upon him the necessity of being alert, courteous and direct in his answers. Perhaps the hardest lesson is the last, which can be summed up: Answer the cross-examiner's question, then come to a full stop. In other words, do not volunteer further comment or information, and let the examiner do the work.

1. When an accused takes the stand, he puts his character in issue, since the prosecution may seek to undermine his testimony by proof of his bad reputation. The trait to which character evidence is relevant is, therefore, veracity. *See* 3 Wigmore, Evidence § 925 (ed ed. 1940); McCormick, Evidence § 158 at 334 n. 7. As a practical matter, the trier of fact is asking "Can this accused be believed?" Courts usually permit the accused to testify about his life history and his aspirations, since such testimony is important to the jury's evaluation of his conduct and the reliability of his testimony. Courts generally let this sort of evidence in, although authority for doing so is scanty.

2. The admissibility of such evidence will depend upon the extent to which the trial court circumscribes the definition of "intent," under the statute involved. In a prosecution for hindering the selective service system by pouring blood on the draft board records, the court held that the defendant's general ideological position on the Vietnam war was irrelevant to the determination of their criminal intent under the Act. United States v. Berrigan, 283 F. Supp. 336, 1 SSLR 3150 (D. Md. 1968). However, in a conspiracy prosecution, the defendants' intention to bring about a legal test of the draft law through counselling young men to refuse service was held to excuse their activity, Keegan v. United States, 325 U.S. 478 (1945); Okamoto v. United States, 152 F.2d 905 (CA10 1945), and on this basis evidence of antiwar views and the reasons for them would be admissible in selective service conspiracy cases. The trial court in United States v. Coffin, *et al.*, No. 68-CR-1-F (D. Mass. 1968), admitted such evidence.

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As lawyers who have handled selective service cases are aware, the defendant can be a powerful and persuasive witness. But he can best serve his own case if aided by careful preparation.

¶ 2263. Other Defense Evidence––On the Merits

Other defense evidence than the documentary materials referred to in ¶ 2257 *supra* and the testimony of the defendant discussed in ¶ 2262 *supra* can include photographs and other documentary materials, character evidence, and the testimony of third persons.

Documents, photographs, charts and models can be powerful aids to effective presentation. Generally, the government has all the advantage in this regard, for it can afford to spend time to dress up its presentation. However, counsel should not overlook the use of material in the defendant's selective service file, newspaper photographs, and even chart summaries of evidence (where appropriate)[1] to highlight the testimony of defense witnesses including the defendant. Without gimmickry, it is often more dramatic to have the defendant discuss a particular item in his selective service file in the context of his testimony than merely to let the file lie in evidence to be commented upon only on the arguments of counsel.[2] If there are photogrpahs and other memorabilia from the defendant's background, it may be wise to put them in while the defendant is testifying. If a jury is impanelled, counsel may decide that the jury should see particular items of evidence as they come in, and pass them to the jury to help keep its attention. Or, he can hold them up in closing argument and urge the jurors to take them into the jury room for their deliberations.

Character witnesses are valuable in many selective service cases, although not of course in the case in which their testimony can be overrun by a series of "have you heard?" questions raising incidents in the defendant's life. A detailed discussion of character evidence is outside the scope of this *Manual*, but may be found in any standard work on evidence.[3]

Using third persons as witnesses calls to mind the considerations adduced at ¶ 2103 *supra*. Generally, newspaper reporters, bystanders and other "neutral" persons are the best witnesses. They should, if possible, be prepared to testify beforehand and not trusted to carry the story of their own. Counsel should also carefully discuss the facts with them to ensure that damaging cross-examination will not ruin their effectiveness.

1. The limits on use of charts to summarize testimony and to present a case in graphic form are set out in Lloyd v. United States, 226 F.2d 9 (CA5 1955) and Flemister v. United States, 260 F.2d 513, 517 (CA5 1958), both income tax cases. Charts are apparently not much used in draft cases. A chart is a handy way to summarize a complicated selective service file, and to put a complicated set of facts in an easily-understood form.

2. A sample interrogation may be helpful:

"Q: I show you this letter, marked Government's 1-A, in evidence. Will you tell His Honor and the ladies and gentlemen of the jury what that is?

"A: That is the letter I wrote the draft board, asking for a Form 150 to fill out.

"Q: Will you read that, please?

"A: [defendant reads letter].

"Q: Directing your attention now to Government's 1-B in evidence, will you tell us what that is, please?

"A: That is the completed Form 150 which I sent the board.

"Q: When did you send that to them?

"A: Well, it said it had to be returned on or before September 22, 1967, so I sent it on the 20th. It took a few days to think through my answers to the questions, and I wanted to be as complete as I could. [The last sentence is "volunteered."]"

The next series of questions should ask the registrant to read out portions of the form and of his answers to questions asked on it. He should not paraphrase – his words as written are best evidence – but may pick and choose the portions to be read. If, for example, the case will largely turn upon the defendant's religious activities, and his references on Form 150 included a minister or other person who will testify or has testified, the defendant may be interrogated as follows:

"Q: Directing your attention to Series V of the Form, which asks for references, will you tell His Honor and the ladies and gentlemen of the jury what appears there.

"A: Well, I wrote in the name of Father Smith, who has been a priest in our parish for ten years. Father Smith knew me quite well, and we used to have long talks about the problems of war. [The last is "volunteered," and may be technically inadmissible, as going outside the file. It does two things: first, it tells the trier something important about the defendant, and it introduces him to Father Smith, who will no doubt be testifying later in the trial. Reliance on the cold Form 150 in the file could not accomplish that.]'.

3. The leading case, and a kind of hornbook on character evidence, is Michelson v. United States, 335 U.S. 469 (1948). *See* McCormick, Evidence §§ 153-62 (1954).

¶ 2264. Motion for Judgment of Acquittal Renewed[1]

The motion for judgment of acquittal at the close of all the evidence must include the statement that the evidence is insufficient to warrant conviction, preferably with a brief discussion of why this is so. This will preserve the right of counsel on appeal to raise the sufficiency of the evidence as a point on appeal.[2] Even if no sufficiency point can be forseen at the time the motion is made, it should be raised, as insurance. The motion may be written or oral. In the typical jury trial, it will be oral, and will rest upon the other

1. F.R.Crim.P. 29 governs motions for judgment of acquittal. *See generally* 8 Moore, Federal Practice, ch. 29 (Cipes ed. – Criminal Rules). *See* ¶ 2261 *supra*.

2. Robbins v. United States, 345 F.2d 930 (CA9 1965) (failure to move for judgment of acquittal at close of all evidence may forfeit right to have sufficiency of the evidence reviewed on appeal); Wilkins v. United States, 376 F.2d 552 (CA5 1967)(semble).

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briefs and papers filed in the case for its formal legal support.[3]

In a judge-tried case, the motion is more likely to be in writing and to be the means by which the parties summarize their respective contentions. If it takes on this role, the following guidelines may be used:

1. Use the transcript of the trial to point up factual matters. Counsel will probably have been ordering daily copy (except in an indigent case), and reviewing it each evening and morning. If at all possible, the factual narrative should be filled with references to the transcript. The object, of course, is to have the judge adopt for his oral ruling or written opinion the defense version of the facts.

2. It should list all points relied upon, but in order of their probable impact upon the trial judge. That is, the point on which you hope to win should be first.

3. The motion should follow the rules of presentation set out in ¶ 2253 *supra* concerning the manner of argument, from elementary propositions to the refinements applicable to the particular case.

The motion might follow this outline:

> "The defendant, John Jones, through his undersigned counsel and pursuant to Rule 29, Federal Rules of Criminal Procedure, moves this Court for a judgment of acquittal. The grounds for this motion, as more particularly set forth in the accompanying memorandum of points and authorities, are as follows:
>
> "1. The evidence shows that Local Board No. --- had no basis in fact for denying the defendant the conscientious objector classification he requested.[4]
>
> "2. The evidence shows that the defendant was denied his absolute and indefeasible right to a personal appearance before Local Board No. ---, in that the board attempted, contrary to law, to substitute a "preclassification hearing" for the post-classification personal appearance guaranteed by the regulations and by due process of law.[5]
>
> "3. The evidence shows that the chairman of Local Board No. --- was, at the time the defendant was reclassified I-A, 76 years old and hence was disqualified to sit in judgment upon the defendant's application for conscientious objector status or otherwise to act as a board member. Hence, the processing and classification of defendant by Local Board No. -- is void.
>
> "4. Peacetime conscription violates the Fifth and Thirteenth Amendments."

The memorandum of points and authorities, in form according to the local rules, should follow the motion point by point.[6]

3. But the motion may be renewed in writing after the verdict is in. *See* ¶ 2267 *infra* and F.R.Crim.P. 29(c).

4. *See* ¶¶ 1034-48 *supra* on the standards for conscientious objection.

5. United States v. Romano, 103 F. Supp. 597 (S.D. N.Y. 1952). *See also* ¶ 1079 *supra*.

6. The administrative section of the *Practice Manual* is designed for use in supporting arguments such as on motions for judgment of acquittal. Refer to the appropriate point for relevant authorities. *See also* ¶¶ 2301-78 *infra* dealing with defenses in a criminal case under the Act.

¶ 2265. Jury Instructions

Practice varies concerning jury instructions. Generally, defense counsel is advised to type up all the standard instructions and those he knows he will want to ask for well in advance of trial, to be given to the judge when he asks for them and sometime prior to the charge to the jury. See F.R.Crim.P. 30.

The purpose of submitting jury instructions is three-fold:

1. To secure the giving of standard jury instructions on burden of proof, evidence, and other matters in a form most helpful to one's own side. To this end, it may be necessary to rewrite the instructions contained in such standard works as Mathes' and Devitt's leading book in the field.[1]

2. To place before the jury one's own side's theory as to issues in the case. On the issue of intent, of the elements of the offense, and who has the burden of proving a particular matter, and so forth, each side will submit proposed instructions. Because the charge to the jury is often turgid and boring, proposed instructions should generally make some reference to the facts of the particular case. For example, in a false statement case:

> "Ladies and gentlemen, there has been testimony in this case concerning the defendant's reputation for veracity. This is what is known in the law as "character" or "reputation" evidence. You may take this evidence into consideration in your deliberations and assign to it the weight you think it deserves. I instruct you that this character evidence, standing alone, may be sufficient to

1. Mathes & Devitt, Federal Jury Practice & Instructions (1965). *See also* Mathes, *Jury Instructions and Forms for Federal Criminal Cases*, 27 F.R.D. 39 (1961). Many counsel make three jury instructions on each point, with numbers one and three setting out the defendant's "maximum" and "minimum" positions respectively and the middle one something in between. In this manner, the court feels it has a choice, and counsel maximizes his chances of getting something close to an acceptable instruction, even if it is not the best he might have hoped for.

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generate a reasonable doubt as to the defendant's guilt and require you to find him not guilty."[2]

3. Jury instructions seek to enlarge, in appropriate cases, the number of issues submitted to the jury for its determination. For example, the issue of classification and processing--"basis in fact"--is generally held to be one for the trial judge to decide. See ¶ 2254 *supra.* However, there are reported cases in which the validity of the defendant's classification has been submitted to the jury.[3] In deciding to ask for an instruction on such an issue, counsel can consider the prospects of success with the issue before the jury, as contrasted with the prospects of success before the trial judge and the appellate court. By making an issue "one of fact" for the jury's decision, counsel builds in an impediment to judicial review, for the courts will give greater deference to a jury verdict on an issue "of fact" than to a judge's determination "of law." For example, the conscientious objector issue can be important and dramatic in summation and having a jury instruction in the wings is an added benefit.

When the jury instructions are submitted and have been gone over by the trial judge, he must inform counsel what he will instruct upon, and will generally specify which proposed instructions are granted and which denied in whole or in part. F.R.Crim.P. 30. By this means, counsel can tailor his closing argument to the charge which the judge will give.[4]

Objections must be taken, on the record, to any portion of the charge to which the defense excepts, or to any omission from the charge of instructions reguested by the defense. F.R.Crim.P. 30. While exceptions may and should be taken during the conference on settlement of instructions, they must also be taken immediately after the judge finishes his charge and before the jury retires. Failure to object waives the objection, and this rule is one of the most rigorously enforced waiver rules in criminal law.[5]

2. This sample instruction is patterned after Mathes & Devitt, *supra,* § 8.26 and cases there cited. However, it departs from the Mathes & Devitt instruction in two important ways. First, it personalizes the charge. Second, it is simpler and more direct than the Mathes & Devitt version, and expressly states the meaning of the doctrine that character evidence standing alone may raise a reasonable doubt as to guilt.

3. Martinez v. United States, 384 F.2d 50 (CA10 1967), *cert. denied,* 390 U.S. 1016 (1968) (district court submitted defendant's CO claim to jury with instruction to acquit if they found it sincere). The question of the right to a jury trial on factual issues arising from the classification process is discussed at ¶ 2254 *supra.*

4. An example of use of the judge's charge in summation is the following introductory paragraph and midsummation excerpt (The excerpt is a composite, and the "facts" are drawn from United States v. Rabb, 394 F.2d 230, 1 SSLR 3164 (CA3 1968)):

> "May it please the Court, ladies and gentlemen of the jury. You have been sitting here in what has been a silent role for the past week. Tomorrow you will take this case with you to your jury room to begin your deliberations, all to the end of arriving at a verdict that is fair and just and equitable and right. . . . It is my purpose at this time to review with you the salient and the material portions of the evidence and to superimpose, as it were, the instructions on the law which His Honor will give to you tomorrow, so that together we may see the points of incidence, because in that way I believe that I can be of maximum help to you.
>
> * * *
>
> "Now ladies and gentlemen of the jury, the defendant gets to the point where he is supporting his family, and he goes and does just exactly what the law requires him to do – he tells his local draft board about the change in circumstances. He files all of this information with the board, letters, documents, affidavits – all of the material which was placed in evidence before you. And you will recall that it was the government's own witness, the clerk of that local board, who identified every one of those papers as having been submitted. Under those circumstances, ladies and gentlemen, what did the local board have an obligation to do? His Honor will instruct you that the board had the responsibility to review this information and tell the defendant yes or no about his claim. The defendant testified, and no one contradicted him, that the clerk told him that the board would be in touch. So what was he to think when a few days later an induction notice came in the mail? Must be some mistake, some clerical error. And here is the crux of this case. Everybody knows the defendant did not report for induction. There is no dispute about that. But not reporting for induction is not a crime, unless it is done "wilfully." His Honor will define "wilfully" for you in his charge: "Wilfully" means with a purpose to violate the law – and not by mistake, accident or in good faith. . . ."

The above is obviously not complete, but it suggests the means by which the judge's charge and the facts of the case can be woven together. The "wilfulness" issue has great potential use in selective service cases, as *Rabb* demonstrates. It may be, as in *Rabb,* a means of securing review of board error in refusal to report cases. *See* ¶ 2452 *infra.*

5. Singer v. United States, 380 U.S. 24 (1965) (stating rule: absent plain error, failure to object waives objection). Carbo v. United States, 314 F.2d 718, 746 (CA9 1963), *cert. denied,* 377 U.S. 953 (1964), excused failure to object upon the stated ground that the defendant had been given no opportunity to file requests to charge. *See generally* 5 Orfield, Criminal Procedure Under the Federal Rules § 30:10-:12, 30:43 (1967).

¶ 2266. Closing Argument

Closing argument is a highly personal matter with counsel, and the kind of closing argument will vary with the personalities of the judge, the jurors, the lawyers and the defendant. (Effulgent, tub-thumping closings do not seem to be in fashion now.) The closing, whatever else it contains, must review the evidence. While it is important to tell the jurors that their recollection, and not that of counsel for either side, controls, this admonition is primarily designed to get the jury to discount factual arguments raised by one's opponent. For after making the observation, counsel should proceed to marshal the evidence, relying heavily

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upon a transcript annotated and indexed so that he can find any phrase or sentence at a moment's glance.[1] and upon any exhibits that are easily used as demonstrative aids. The summation should work in the law as the judge will declare it, see ¶ 2265 n.4 *supra*, and there is no rule against telling the jurors that "His Honor will instruct you that . . ." and then tying that instruction to some aspect of the case. Great care must be taken here that the judge's proposed charge is not misstated or misrepresented, and that in making use of it one does not go so far as to provoke a comment from the bench.

A summation ought to begin with general principles and a statement of intention, see ¶ 2265 n.4 *supra*, and proceed to a discussion of the issues in the case at hand. The following general principles should be stressed by counsel: appreciation of the jury's patience and attention; the jury is the judge of the facts; unless the evidence shows guilt beyond a reasonable doubt the jury must acquit; the jury is to view the facts in the light of its own common sense and its own sense of justice. The middle portion of the summation should be addressed to propositions of fact and law which are thought to compel acquittal. It has been suggested that counsel make reference,[2] near the close of the summation, to the prosecutor's anticipated rebuttal. It should be pointed out that the prosecutor has the last word, and that the purpose of his rebuttal is to comment on new matters raised in the defense summation. The way is thereby laid open to make objection in the presence of the jury to the misuse of the rebuttal privilege , should that become necessary.

1. The usual practice of experienced trial counsel is to order a daily copy of the transcript. (However, in an indigent case in which counsel is appointed under the Criminal Justice Act, he will not usually be able to secure daily copy - though he may wish to ask for it on CJA Form 8.) This copy should be annotated and indexed according to subject matter. Excerpts to be used in cross examination, *see* ¶ 2260 *supra*, and in closing should be xeroxed or photocopied and arranged by subject matter or in the order in which they are to be used. By this means, counsel can drive home his points one by one with quotes from the transcript without fumbling or rummaging through a pile of papers. Effective closings have been seriously marred by long pauses to find a transcript reference, and the most embarrassing situation of all occurs when counsel launches upon an analysis of a point, announces support in the transcript reference and then is unable to find it.

2. 2 Amsterdam, Segal & Miller, Trial Manual for the Defense of Criminal Cases § 446 (1967).

¶ 2267. Posttrial Motions—Judgment of Acquittal

Counsel has seven days from discharge of the jury--unless within the seven days the time is extended by order of the court--to prepare and file a written motion for judgment of acquittal. F.R.Crim.P. 29. The style of the motion is as given at ¶ 2264 *supra*. The motion need not be filed, and if it is not no consequence ensues other than perhaps a slight speeding up in the post-verdict process. Timely post-trial motions suspend the running of the time in which an appeal must be taken.[1] It is generally a good idea to file a written motion in any jury trial in which all previous motions have been oral, as a means of organizing the record and making clear to the trial judge what one's position is and to the appellate court that every possible remedy was made use of in the court below. If the appeal is to be in forma pauperis, there must be a list of grounds for appeal, (as there need not be in a case not appealed in forma pauperis) and a motion for acquittal helps to organize them. F.R.App.P. 40.

1. F.R.Crim.P. 37(a)(2).

¶ 2268. Posttrial Motions—New Trial

A motion for new trial must also be made within seven days after verdict or finding of guilty if it is to be made at all.[1] If the case has been tried by the court alone, the motion is to be made within seven days after completion of the trial and finding of guilt, whether or not judgment has been entered. F.R.Crim. P. 33.

The motion is addressed to errors occurring during the trial and to other matters which would not require the granting of a judgment of acquittal, ¶ 2267 *supra*, or a motion in arrest of judgment. ¶ 2269 *infra*. It should follow the standard motion form. For example:

> "The defendant, John Jones, through his undersigned counsel and pursuant to Rule 33 of the Federal Rules of Criminal Procedure moves this court for an order [setting aside the judgment entered herein and][2] granting him a new trial in this case. The grounds for this motion, as more particularly set forth in the attached memorandum of points and authorities are:
>
> "1. The court erred in admitting into evidence the memorandum of the Superintendent of Lakeview Hospital, contained in the defendant's selective service file, and stating that the defendant had reported but refused to perform the work assigned to him at the hospital. The only proper means to prove the defendant's refusal would have been the live, cross-examinable testimony of

1. Not considered here are motions for new trial based upon newly discovered evidence, a subject which is not likely to arise often in selective service cases. *See* 8 Moore, Federal Practice ch. 33 (Cipes ed. – Criminal Rules).

2. This phrase should be added if, between the time of verdict or finding of guilty and the filing of the motion, judgment has been entered.

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the Superintendent or some other person having personal knowledge of the facts.[3]

"2. The court erred in refusing to grant defendant's requested instruction number 26.

". . ."

3. *See* ¶ 2257 *supra.*

¶ 2269. Posttrial Motions—In Arrest of Judgment

The motion in arrest of judgment, which must also be filed within seven days after the trial, may be addressed only to the failure of the indictment to state an offense and to the lack of jurisdiction of the court to try the case. F.R.Crim.P. 34.[1]

1. Loss of jurisdiction might occur when the court grants a motion to amend the indictment. Ex parte Bain, 121 U.S. 1 (1887). *Bain* of necessity rests upon the premise that amendment deprives the court of jurisdiction for at the time it was decided the Supreme Court had no appellate jurisdiction in federal criminal cases and the question was whether an original writ of habeas corpus could issue for want of jurisdiction in the trial court. *See generally* 8 Moore, Federal Practice ch. 34 (Cipes ed. - Criminal Rules).

¶ 2270. Sentencing Procedures—Tactical Considerations—Sentencing Provisions

The Act provides for a sentence of not to exceed five years and a fine not to exceed $10,000 or both such fine and imprisonment. §§ 12(a),(b). That is only the beginning, however, for there are a number of sentencing provisions which may be applicable and counsel should be aware of all of them in order to do the best job in securing the lowest possible sentence.

The general federal sentencing provision, 18 U.S.C. § 4082(a), provides for commitment of a defendant to the custody of the Attorney General for a period fixed by the court, and the Attorney General then selects the place and manner of confinement in accordance with other provisions of § 4082. A fine may be imposed under the provisions of 18 U.S.C. § 3565, and will be "committed" or "uncommitted." If the sentence or judgment merely states that the defendant is to pay a fine (an "uncommitted" fine), the fine must be collected in the same manner as a civil judgment. If the sentence of judgment states that the fine is to be paid before the defendant may be released (a "committed" fine), then appropriate steps will be taken to enforce that order, subject, however, to 18 U.S.C. R 3569, which provides that after an indigent has served thirty days for want of the money to pay the fine, he may apply for release. These provisions for incarcerative sentence and fine are not the only relevant sections of the Criminal Code. 18 U.S.C. § 3651 provides that the court may suspend the imposition or execution of sentence and place the defendant upon probation.

For defendants under 26, still other provisions are vitally important in the matter of sentencing. The Youth Corrections Act (YCA), 18 U.S.C. § 5005 *et seq.*, provides that the court may, in the case of a defendant between 18 and 22, sentence under the penalty provision of the YCA; impose an incarcerative sentence under the provisions of the Selective Service Act, but direct that the sentence is to be served in the manner set out in the YCA; or impose a nonincarcerative sentence of a special type. 18 U.S.C. § 4209 permits the court to sentence a defendant between 22 and 26 under the YCA. The YCA is, therefore, of potential application to a large number of convicted selective service defendants.

Briefly, the YCA provides the following alternatives:

1. Probation without incarceration. § 5010(a) provides for probation without incarceration, and is supplemented by the provision of § 5021(b) that the court may grant the defendant a certificate setting aside his conviction upon application made before expiration of the period of probation. The setting aside requires, therefore, *application to the court before probation expires;* this must not be overlooked or forgotten or confused with the automatic setting aside of the conviction when an incarcerative sentence is given under the YCA.

2. The court may sentence the defendant under the penalty provisions of the Youth Corrections Act, ignoring the provisions of § 12 of the Selective Service Act. Under this procedure, the defendant will receive a sentence of six years, only four of which may be served in custody, and the last two of which must be served on conditional release. See § 5021(a), § 5017(c).

3. The court may sentence the defendant to a term within the statutory maximum under § 12 of the Selective Service Act, but under the YCA treatment provisions. §§ 5010(c), 5017(d).

4. The court need not sentence under the YCA Corrections Act at all, § 5010(d).

5. The court may commit the defendant for sixty days observation and treatment to determine if he

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should be sentenced under the provisions of the YCA. R 5010(e). This procedure results in a thorough social-psychological study of the defendant and may provide information which can be used in arguing for a non-incarcerative sentence.

It is counsel's job to use his knowledge of these sentencing provisions to secure favorable action by the probation officer and the court.

¶ 2271. Presentence Report

F.R.Crim.P. 32(c) provides for a presentence report "unless the court otherwise directs." The report is prepared by the probation officer based on investigation and on an interview with the defendant. In many jurisdictions it is possible to request that a particular probation officer prepare the report.

In any case, the defendant should submit not only all materials requested by the probation officer--birth records, school records, work records, and other related materials--but also letters of reference, awards, commendations and other materials designed to impress the probation officer favorably. In most cases, there will be no need to restrict the sort of material given to the probation officer. However, where there is a possibiltiy that the defendant will tell the probation officer about or be asked about other crimes, or where there is likely to be an appeal and the possibility of a new trial in which the defendant's statements to the probation officer should be harmful, then counsel should suggest that he be present during the interview with the probation officer and that the defendant should perhaps write up his version of events to submit to the probation officer rather than having a lengthy interview. This precaution is necessary only in a small minority of cases, however.[1]

The presentence report should be available for counsel's inspection as a matter of routine. Although Rule 32(c) gives the trial judge discretion in this regard, the intent of the provision of subsection 32(c)(2) as amended in 1966 is to permit defense counsel in every case to see or at least know the main outlines of the report as they will bear upon the sentencing decision.[2]

Counsel should use his knowledge of the presentence report to make his presentation to the judge on sentencing.

1. In some cases, counsel may have ground to forbid even a written statement of the defendant's version of the case. If he takes this view, he should write a letter to the Probation Officer setting out the possible prejudicial effect of a discussion by the defendant of his situation, and asking that the Probation Officer take an understanding view toward a serious practical problem.

2. Advisory Committee Notes, 39 F.R.D. at 193, contain an extensive bibliography on release of the presentence report.

¶ 2272. Memorandum Concerning Sentencing

Counsel should analyze the law of sentencing and submit a memorandum concerning the favorable sentencing alternatives available to the trial court and the facts bearing upon sentencing that will favorably impress the judge. If counsel has been doing his job, throughout the trial the defendant will be portrayed as a responsible person who does not belong in the penitentiary. But it may be wise to analyze the transcript, the materials submitted to the probation officer and other materials to make the most persuasive case for probation. If the judge is unfamiliar with selective service cases, the memorandum may dwell upon instances in which probation has been granted. The Central Committee for Conscientious Objectors (address in SSLR *Bibliography*) lists sentences in its monthly "News Notes," and SSLR reports some sentences (particularly when the sentence is an unusual type or given with an opinion or other indication of its basis). These sources will provide a starting point for research, and will help convince the judge that a probationary sentence is not an unusual event. Counsel may stress, if he can, the defendant's willingness to do alternative service or similar work as a condition of probation.[1]

1. *E.g.*, United States v. Margolies, 1 SSLR 3125 (D. D.C. 1968). The sentencing memorandum of counsel for *Margolies* is available from SSLR's facsimile service ($1.00).

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¶ 2273. Sentencing

At the sentencing, the attorney and the client are each given the opportunity to say something. Good sense and tactical judgment will determine what is said. Denial of the right of allocution may result in remand for resentencing or even in reversal of the conviction.[1] The right to counsel at sentencing is absolute.[2]

1. Haywood v. United States, 393 F.2d 780, 1 SSLR 3070 (CA5 1968).

2. *E.g.*, Gadsen v. United States, 223 F.2d 627, 631 (CA DC 1955).

¶ 2274. Bail Pending Appeal

Bail pending appeal is governed by Rule 9 of the Federal Rules of Appellate Procedure, and by the Bail Reform Act, 18 U.S.C. RR 3146-52. The latter provides that while bail is not a matter of right pending appeal in a felony case, it should be granted on the same basis as bail pending trial, taking into account the evidence adduced at trial. See ¶ 2107 *supra.* F.R.App.P. 9 governs the procedure on review of denial of bail. After exhaustion of the remedies there provided, habeas corpus will probably lie to test the confinement.

¶¶ 2275-76. [Vacant]

5. Appeal and Post-Conviction Remedies

¶ 2277. Appeal to Court of Appeals

The procedural requirements for taking an appeal are complex; however, the Federal Rules of Appellate Procedure (F.R.App.P.), which became effective July 1, 1968, have largely eliminated the confusing and purposeless variations in rules among courts of appeals. The Appellate Rules are available in a softcover volume along with the Federal Rules of Criminal Procedure and the Criminal Code (18 U.S.C.), from West Publishing Company. The F.R.App.P. are supplemented by each court of appeals, to conform to local practices, and a copy of each court of appeals' rules is available from the clerk of court and in U.S.C.A.

¶ 2278. Procedural Requirements

The most important requirement is the timely filing of a notice of appeal, within 10 days after entry of judgment. F.R.App.P. 3,4.[1] Judgment is not entered until the time of sentence. If the defendant is indigent, counsel should look into the practice of granting appointments in criminal cases on appeal in his jurisdiction, in order that he may receive some compensation, but more important, in order that expenses on appeal will be borne by the government. The procedure for taking an appeal in forma pauperis is spelled out in F.R.App.P. 24, which requires a motion for leave to appeal in forma pauperis (unless the defendant proceeded in the trial court in forma pauperis) with accompanying affidavit in the form prescribed by the rule. The application for leave to appeal should include a provision in the proposed order that the transcript

1. The notice *must* be timely filed. F.R.App.P. 3(a). Sometimes in the post-conviction hurly-burly, the proper timing of the notice is a bit confusing. The provisions of F.R.App.P. 4(b) make matters as clear as can be. But the overriding thing to remember is: the notice may be filed at any time within ten days after the imposition of sentence and entry of judgment, which will be done orally and in open court and followed by filing of a formal "Judgment and Commitment." If the denial of timely-filed posttrial motions should come *after* judgment, the ten days runs from the day of denial. One can file the notice of appeal early, but filing it triggers the rules relating to arranging for a transcript of the record, and most lawyers want a little rest after losing a case.

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is to be provided at government expense (see Form 4, Appendix of Forms, F.R.App.P.)[2]

Forty- days after notice of appeal is filed, the appeal must be docketed. F.R.App.P. 10-12 deal with preparation, transmission and docketing of the record on appeal.

2. The following order may be used in most circuits, although counsel should check with the district court clerk's office to see whether a standard printed or mimeographed form is in use. The order should begin with the caption of the case, using the district court name, case style, and docket number:

"ORDER

"It is, this -- day of -----, 19--,

"ORDERED that the above-named applicant be and hereby is authorized to proceed on appeal without prepayment of costs, and it appearing to the Court that a transcript of the proceedings will be needed for determination of the appeal, it is

"FURTHER ORDERED that a transcript of the trial proceedings (except as indicated below) be prepared and furnished at the expense of the United States for use on appeal.

"IT IS FURTHER ORDERED that consideration for the appointment of counsel on appeal be and hereby is referred to the United States Court of Appeals for the --- Circuit [and the court recommends that ---- be appointed counsel for appellant].

United States District Judge"

Entry of an order such as that above is not necessary, except as to the transcript, if the defendant proceeded in forma pauperis in the district court. Some judges perfer not to recommend a particular lawyer on appeal, and it may be necessary to leave out the language in brackets and apply to the court of appeals for appointment.

¶ 2279. Briefing a Selective Service Case

A brief consists of three important elements, the statement of questions presented, the statement of facts and the arguments. Tables, appendices, and indexes are also included, and a summary of argument may be included at the discretion of the advocate, and should be if the issues are complex. F.R.App.P. 28.

Brief writing has been described and explained in a number of publications, and every lawyer has his favorite reference work.[1] Granted that brief-writing is a highly individual art, one may make certain suggestions applicable in the bulk of selective service cases.

First, the statement of facts. The defendant is a human being, and more often than not an appealing and sympathetic one. The statement of facts should put him into perspective. Good trial strategy will have ensured that facts about his life and background are in the record, ¶ 2262 *supra,* and these should be set out in a brief paragraph. The history of the defendant's involvement with the Selective Service System should be summarized to the extent relevant. The aim here is to begin convincing the court that the defense version of the facts is the proper one without going so far as to evoke a plausible complaint of misrepresentation from the other side in its brief. Distinguish between central facts and those not so important, and do not engage in lengthy disputes of analysis of the record to prove collateral points. It would suffice to say, for example, that "the evidence was in conflict" as to whether certain events, not central to the case on appeal, took place, citing the relevant pages of the transcript and indicating which witness took which view.

It is permissible, in a statement of facts, to introduce the court to the law that will be argued. For example, in beginning a discussion of an improper classification defense, one might say, "Recognizing the well-accepted principle that a local board may not arbitrarily refuse to reopen a defendant's classification, the trial court admitted evidence of the defendant's having written to his local board to request the conscientious objector exemption." Such phrases put argument into context. Another means of arranging the facts in a multi-issue appeal is by subject matter, through the use of boldface subheadings within the Statement of Facts. For example, under the subheading "Arbitrary Failure to Reopen Classification,"[2] would come facts concerning alleged local board error, other matters would be presented under other headings, such as "Denial of Right to Physical Inspection at Induction Station,"[3] "Motion for Mistrial Denied," and so on.

The "statement of issues on appeal," F.R.App.P. 28(a), constitute an important means of putting defense contentions before the court. A principle problem in every appeal is defining the issues, and proper framing of the issues in the opening brief may go a long way toward helping a party to prevail. For example, a question which could be stated, "Whether the local board's refusal to reopen the defendant's classification was arbitrary and capricious, and vitiated its subsequent order to report for induction," might more effectively be stated thus:

> "Whether, when a registrant submits to his local board a request for conscientious objector status containing a lengthy discussion of his religious views in opposition to participation in war in any form, and letters from a minister, a teacher and a life-long friend attesting to his sincerity,

1. The best such work is probably Weiner, Briefing and Arguing Federal Appeals (1961).

2. *See* ¶ 1096 *supra*.

3. Briggs v. United States, -- F.2d --, 1 SSLR 3144 (CA9 1968)

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the local board may refuse to reopen his classification and thereby deny him the rights of confrontation, personal appearance and appeal which are given to registrants whose classifications are reopened."

Finally the argument must be considered. Nonconstitutional arguments should be made first, if they are potential case-winners. If they are minor and technical, they should probably be left to the last. It should be recalled, see ¶ 2252 *supra,* that many appellate judges are unfamiliar with selective service law. If there is a basis in fact point or refusal to reopen point in the case, perhaps it should be raised first in order to introduce the court to the basic elements of judicial review in selective service cases. Another method of arranging issues is in the order in which they arose--Selective Service System errors first, wrongful denial of pretrial motions second, and trial error third.

¶ 2280. Certiorari

If the judgment on appeal goes against a criminal defendant, he has thirty days in which to petition for certiorari. Supreme Court Rule (hereinafter Sup.Ct.R.) 22(2). He may be advised first, however, to petition the court of appeals for rehearing or rehearing en banc. F.R.App.P. 40; 28 U.S.C. § 46. Also, it is necessary to petition the court of appeals for an order staying its mandate pending filing of a petition for certiorari. F.R.App.P. 41. If such a motion is not made, the mandate will go down to the district court and the defendant arrested to begin serving his sentence. Denial of such a motion necessitates seeking action from a single justice of the Supreme Court, the procedure for seeking and grounds for granting a stay are set out in Stern and Gressman's handbook.[1] Stays are governed by F.R.App.P. 41 and Sup.Ct.R. 27, 50, 51.

The petition must, then, be filed within thirty days after the court of appeals' judgment,[2] and that time is reckoned either from the day the judgment is filed, or from the date of disposition of a timely petition for rehearing.

The petition for certiorari, like the brief on appeal, is the subject of much good writing of a "how-to" character.[3] Twenty to twenty-five pages is the optimum length from beginning to end (the "Reasons for Granting the Writ" need hardly ever be over ten pages), the bases for review include importance of a question not previously decided or a conflict in the circuits, Sup.Ct.R. 21, and the rule is brevity and avoidance of a proliferation of issues. The petition should raise broad-guage issues likely to have a great impact upon the administration of the System, and which involve the substantial rights of a large class of registrants or raise a problem which has recurred in the circuits. The method of argument in a petition for certiorari is different from that in a brief; the ultimate issue is the importance of the questions presented for review and not the merits of the petitioner's position on those questions. Obviously, importance and merits are impossible to completely separate from one another, but many petitions for certiorari suffer from tendentious argumentation of the rectitude of the petitioner's position in the trial court and the court of appeals.

If certiorari is granted, the petitioner must within 45 days prepare and file a brief on the merits and an appendix. Sup.Ct.R. 36, 41. The case will then be set for oral argument during the Term which begins in October of each year.

If certiorari is denied, the way is open to petition the court for rehearing, Sup.Ct.R. 58 (accompanied by a motion for a stay of the order denying certiorari, Sup.Ct.R. 25(2), or to begin one of the post-conviction proceedings listed in the following paragraphs.

Important in the course of proceedings before the Supreme Court is the role of the Solicitor General of the United States, who represents the United States before the Court. He may, and generally will, file a brief in response to the petition for certiorari, Sup.Ct.R. 24, and his opposition to or acquiescence in the granting of the writ carries some weight with the Court. Moreover, he has the power to confess error on behalf of the United States, a power which he has used on occassion in draft cases.[4] A confession of error, however, will not necessarily conclude the case.[5]

1. Stern & Gressman, Supreme Court Practice (3d ed. 1962) is the acknowledged leader in the field. However, the Supreme Court rules were entirely revised in 1967, and a new edition of Stern and Gressman will be published by the Bureau of National Affairs in December 1968. The 1967 amendments are discussed in an article by Boskey and Gressman, 42 F.R.D. 139 (1967), and the new rules themselves are available in pamphlet form from the Clerk of the Court. The new rules institute a number of new requirements, particularly regarding transmission of the record and preparation of the appendix on appeal if certiorari is granted. Some court of appeals clerks were not, in late 1968, aware of all the changes, and counsel *must* be sure the rules are carried out when he asks that the record be sent to the Clerk of the Supreme Court.

2. Extensions of time are available in criminal cases. Sup.Ct. R. 22(2).

3. Stern & Gressman, *supra* note 1.

4. A striking instance is cited in ¶ 1040 *supra*, at note 5.

5. In Orloff v. Willoughby, 345 U.S. 83 (1953) (selective service case), the court noted that the confession need not be accepted. The matter is further discussed in Petite v. United States, 361 U.S. 529 (1960), in which the government filed a motion to vacate the judgment of conviction and to remand for dismissal of the indictment on the ground that it had prosecuted petitioner by "inadvertance," in violation of its own internal policies. The court granted the motion. However, in Ivanov v. United States, No. 885, October Term 1967, No. 11, October Term 1968, the Solicitor General asked that the judgment of the court of appeals be vacated and the cause remanded for a hearing on illegal electronic surveillance, and the petitioner consented to that course, but the Court granted certiorari and set the case down for argument on the merits. 392 U.S. ––.

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¶ 2281. Post-conviction--Attack on the Judgment

28 U.S.C. R 2255 provides a method for collateral attack on a federal criminal conviction, including a selective service conviction. The procedure is virtually identical to that on habeas corpus, except that the application for relief, termed a "Motion to Vacate Sentence" is filed in the sentencing court, containing the grounds for setting aside the conviction. The grounds for relief must be "jurisdictional" in character to render the judgment subject to "collateral attack" in the words of § 2255 , although with the erosion of technical limits on collateral attack review the term "jurisdiction" is not helpful in analysis of what may or may not be raised in a Motion to Vacate. Generally, constitutional error may always be raised, and substantial errors of law may sometimes be raised.[1] The motion is principally useful to the practitioner when by virtue of a superceding decision or a new insight, he sees a ground for relief which did not arise at trial. It may also be useful to counsel entering the case after denial of certiorari.

1. Section 2255 is a statutory substitute for federal habeas corpus providing all the same benefits but in the sentencing forum. Indeed, § 2255 could probably not be made more restrictive than federal habeas without falling afoul of the constitutional proscription, Article I, § 9, against suspension of the Great Writ. For extended discussion, *see* Sokol, A Handbook of Federal Habeas Corpus, § 21-26 (1965); Wright, Federal Courts, § 53 at 179 (1963).

¶ 2282. Post-conviction Relief--Correction or Reduction of Sentence

F.R.Crim.P. 35 provides that a court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time limited for reduction of sentence. A court may reduce a sentence within 120 days after sentence is imposed, or within 120 days after receiving the mandate of the court of appeals affirming the conviction, or within 120 days after entry of an order of the Supreme Court denying review of or having the effect of upholding a judgment of conviction.[1]

An illegal sentence is one imposed in violation of statute; a sentence imposed in an illegal manner is one imposed without, for example, giving the right of allocution or the right to counsel.[2] Reduction of sentence is the important provision for present purposes. The period between conviction and affirmance, if the conviction is affirmed, gives tempers a chance to cool and the defendant a chance to show the court what he will do with his life. After the process of appeal is completed, it may be propitious to apply for reduction of sentence, citing facts and making arguments in support of probation or a shorter prison term.

1. Whether a petition for rehearing in the Supreme Court extends the time for filing a motion to reduce sentence was considered but not decided in United States v. Mitchell, 392 F.2d 214, 1 SSLR 3068 (CA2 1968). The better practice would be to file the motion within 120 days from the denial of certiorari.

2. Haywood v. United States, 343 F.2d 780, 1 SSLR 3070 (CA5 1968) (allocution – conviction reversed partly on this ground, but the usual remedy is to remand for resentencing); Gadsden v. United States, 223 F.2d 627 (CA DC 1955) (counsel).

¶ 2283. Parole

Part 1643 of the regulations provides for parole of a convicted registrant into the armed forces, or into civilian work. However, no parole into noncombatant duty may be granted unless the registrant's latest classification is I-A-O and no parole may be granted into civilian work unless the registrant is incarcerated for failure to report for civilian work. The procedure is set out in the regulations and provides for approval by the Attorney General or his designee and a recommendation by the Director of Selective Service.[1]

1. Part 1643 is construed in Deans v. United States, 279 F. Supp. 690, 1 SSLR 3132 (D. Conn. 1968).

C. Particular Defenses

¶ 2301. Defenses--Generally

As pointed out above, most defenses to selective service cases arise out of the administrative process and are dealt with in Parts I and II of the *Manual*. Treated here are four defenses that do not fall into that category, including the argument that conscription is unconstitutional, the argument that a particular war is unlawful, the argument that particular classification procedures violate the constitution, and the argument that particular substantive classification standards are unconstitutional.

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¶2302. The Constitutionality of Conscription—Generally

It was pointed out in ¶2 of this *Manual* that conscription was regarded as unconstitutional by the English Parliaments of the 18th century. Contemporary American arguments against conscription fall into several definable categories. We do no more than note them here. These arguments have not met with success in the courts, and there is little likelihood that the settled course of federal decision will be changed. The one open question, the constitutionality of peacetime conscription, has not been settled by the Supreme Court in a direct holding, although strong dicta attest to the present Court's views in the matter.[1]

1. United States v. O'Brien, 391 U.S. 367, 1 SSLR 3029 (1968).

¶2303. Article I and the Powers of Congress[1]

It has been forcefully argued that conscription is beyond the powers of Congress, because Congress is limited by Article I to raising armies and to providing for calling forth the militia to suppress insurrections and repel invasions.[2] Indeed, it is expressly provided in Article I, § 8, that the militia thus called into federal service shall serve under the command of its state officers, subject to the command of Congress as to its discipline. This power to raise armies is separate from that relating to the declaration of war, and it is fairly

1. This question has been the subject of extensive consideration in the literature, principally from the pro-conscription forces who take an historical view favorable to their own position. The pro-conscription sources include: Hershey, *Procurement of Manpower in American Wars*, 241 Annals of the American Academy of Political and Social Science 15 (1945); Hershey, Outline of Historical Background of Selective Service (1960) (available from Government Printing Office); 1 Selective Service System, Backgrounds of Selective Service (Special Monograph No. 1 1947). There is an historical review of conscription in America in the Selective Draft Law Cases, 245 U.S. 366 (1919). The principal argumentative technique of such works is to stress the "conscription" laws of the various states in the early days of the Republic, while recognizing that these laws were largely ineffective and were indeed merely a means for gathering together a group of soldiers from among the citizenry when the occasion warranted, and for a limited period. The arguments then analyze the performance of volunteers and militiamen in the various American military encounters from 1776 until the Civil War, and conclude that a system of conscription was inevitable if the North and South were to prosecute the Civil War. There is, however, another view of this history, a view which stresses the continuous course of opposition to conscription on the part of many American statesmen. *See* the chapter entitled "Brief History of Conscription" in The Draft? (1968), and materials there cited.

2. The Constitution, Article I, § 8, vests in the Congress the following powers: "to . . . provide for the common Defence . . . of the United States"; "To declare War . . . "; "To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years"; "To make Rules for the Government and Regulation of the land and naval forces"; "To provide for calling forth the militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"; "To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States. . . ." These powers constitute the sole source of Congressional authority in the matter of conscription. And it must be said that whatever the merits or the outcome of the argument on the legality of conscription, raising an army by conscription does not appear to have been contemplated by the framers of the constitution. The Federalist Papers dealing with the congressional power to raise an army, Nos. 24-29, nowhere suggest that conscription is to be employed, and the early history of the Republic demonstrates that conscription was "considered alien to American principles of freedom." The Draft? 1 (1968). George Washington's "peace establishment," as he termed it, consisted of a well-constituted militia and a small standing army to protect the American frontier (*compare* Hamilton's views on a standing army, Federalist No. 24). Washington did not discuss a draft except to say that one might have to be instituted if enough militiamen did not volunteer for the small standing army. And, of course, Washington's plan fit well into the constitutional scheme discussed above. But even the limited concession to military conscription embodied in Washington's plan (submitted to Congress as the Knox Plan), was voted down. In 1792 a watered-down substitute plan was adopted. *See generally* Leach, Conscription in the United States: Historical Background (1952); Hunt & Scott, The Debates in the Federal Convention of 1787 (1920).

In 1790, however, Rhode Island proposed a constitutional amendment to provide "That no person shall be compelled to do military duty otherwise than by voluntary enlistment, except in cases of general invasion; anything in the second paragraph of the sixth article of the Constitution, to the contrary notwithstanding." This amendment was rejected, and its rejection has been cited as support for the view that conscription was thought legitimate by the early Congress. United States v. Garst, 39 F. Supp. 367 (E.D. Pa. 1941). However, seen in light of the rejection at the same session of the Knox plan, rejection of the Rhode Island proposal might just as easily (and more logically) have rested upon a supposition that conscription was not sanctioned by the constitution. It must also be recalled that the tradition in which the framers viewed the problem of raising an army rejected conscription. Not only did the British much distrust a standing army (a feeling carried over to the colonists, to judge by the force with which Hamilton argued the necessity for one, Federalist No. 24), but conscription was regarded as unconstitutional except for the loose, idle and the disorderly. *See* ¶2 *supra*. Boyer, The Reign of Queen Anne 123-25, 319 (1735).

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clear that the former power does not depend upon exercise of the latter.[3] However, it is equally clear that Congress is not explicitly given the power to conscript and that the presence of one clause relating to mobilization of the country--the militia clause--would on ordinary principles of construction militate against the presence of the power to mobilize the nation by another means.[4]

This rationale has some historical evidence in its support and was the principle basis for the first opinion in *Kneedler v. Lane.*[5] The original *Kneedler* holding was, however, overturned some months thereafter, the personnel of the court having changed. The rationale of the first *Kneedler* holding rejected in the *Selective Draft Law Cases*[6] and has never found authoritative judicial favor. It is nonetheless the argument which seems to hew most closely to orthodox principles of constitutional interpretation.

3. So stated in Federalist No. 24.

4. Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 228-29 (1957) (stating rule of construction).

5. 45 Pa. 238 (1893), discussed in Bernstein, *Conscription and the Constitution: The Amazing Case of Kneedler v. Lane*, 53 A.B.A.J. 708 (1967). The Chief Justice's opinion, 45 Pa. at 240, begins with an analysis substantially similar to that above. *But see* Selective Draft Law Cases, 245 U.S. 366, 388 (1919), collecting authorities from North and South during the Civil War in support of the constitutionality of conscription.

6. 245 U.S. 366 (1919).

7. *See also* Holzer, The Draft and the Constitution (reprinted from the Objectivist, October-November 1967) (listed in SSLR's *Bibliography*), for a "limited government" rationale.

¶ 2304. Thirteenth Amendment

It has been argued that conscription violates the thirteenth amendment, as a form of slavery or peonage. This view, which was also rejected in the *Selective Draft Law Cases,*[1] rests upon an economic analysis propounded by liberal and conservative economists alike.[2] Conscription calls forth services of young men at far less than the market value of such services. The incidental effect of this underpayment is to exact forced-draft labor from those called, a kind of tax, thereby benefiting those in upper-income brackets who would otherwise have to pay a larger share of the cost of a volunteer, market-value military forces. For those from whom the labor is exacted at less than market value, the difference between the pay they receive and the market value of their services may be termed an index of bondage or peonage.[3]

1. 245 U.S. 366 (1919). *But see* United States v. Copeland, 126 F. Supp. 734 (D. Conn. 1954), the court said that conscription into private employ would raise serious thirteenth amendment questions. The *Copeland* dictum was, however, rejected by the Ninth Circuit in Taylor v. United States, 285 F.2d 700 (CA9 1960), and by the Seventh Circuit in United States v. Hoepker, 223 F.2d 921 (CA7 1957).

2. The arguments are summarized and discussed in Oi, *Can We Afford the Draft?*, Current History, July 1968, p. 34. More technical analyses of the economics of conscription may be found in Altman & Fechter, *The Supply of Military Personnel in the Absence of a Draft*, American Economic Review, May 1967, vol. 2, # 2, p. 19; Hansen & Weisbrod, *Economics of the Military Draft*, 81 Quarterly Journal of Economics 395 (1967); Oi, *The Economic Cost of the Draft*, American Economic Review, May 1967, Vol. 2, # 2, p. 39. These analyses are important for they answer the contention (*see, e.g.,* United States v. St. Clair, 1 SSLR 3184 (S.D. N.Y. 1968), that conscription is not at all like forced labor.

3. Again, it must be said that this argument has never met with judicial approval, and has been rejected in the following cases, among many others (in addition to those cited at note 1 *supra*): Howze v. United States, 272 F.2d 146 (CA9 1959); Heflin v. Sanford, 142 F.2d 798 (CA5 1944). Many other relevant authorities are set out in Justice Douglas' opinion dissenting from the denial of certiorari in Holmes v. United States, 391 U.S. 936, 1 SSLR 3084 (1968), *denying cert. to review* 387 F.2d 781 (CA7 1967), and Hart v. United States, 391 U.S. 956, 1 SSLR 3087 (1968), *denying cert. to review* 382 F.2d 1020 (CA3 1967).

¶ 2305. Issues of Personal Liberty

Finally, conscription has been criticized as an interference with personal liberty, a claim founded upon the ninth amendment and the due process clause. Whatever the constitutional basis, the claim is either that conscription is absolutely unconstitutional,[1] or that it is unconstitutional in the absence of some compelling necessity.[2] The compelling necessity may be war, and some take the position that wartime conscription is alright, but not peacetime conscription.[3] Or the objection may be phrased in terms of an "alternatives" test, that is, that this interference with liberty cannot be undertaken unless and until the alternatives of a volunteer army has been undertaken and shown to be impossible of attainment.[4] This test finds support in cases involving the interplay of free speech rights with public needs. For example, in *Schneider v. Irvington,*[5] a leafleting case, the community justified its absolute prohibition on the distribution of handbills by saying

1. Holzer, The Draft and the Constitution (reprinted from The Objectivist, October-November 1967).

2. *See* Mr. Justice Douglas, dissenting from denials of certiorari in *Holmes* and *Hart,* ¶ 2304 n. 3 *supra.*

3. *Id.*

4. This argument was made in United States v. Butler, 389 F.2d 174, 1 SSLR 3071 (CA6 1967), *cert. denied*, 390 U.S. 1039 (1968), and was rejected by the court. But the opinion well sets out the main lines of the argument. *See also* Freeman, *The Constitutionality of Peacetime Conscription*, 31 Va. L. Rev. 40 (1944).

5. 308 U.S. 147, 163 (1939).

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that handbills cast away by persons accepting them created a litter problem. The Supreme Court responded by saying that only if it could be shown that there was no reasonable alternative means of disposing of litter or dealing with littering could the city even raise for discussion the question of a ban on leafleting.[6] So the analogy runs, until all means less drastic have been tried and have failed, there is not justification for a system of conscription.

6. *See* United States v. Robel, 389 U.S. 258 (1967) (another statement of the "alternatives" test).

¶ 2306. Relevance of Issue to Particular Cases

The system of conscription may be invalid and yet its constituent parts may not all fall with it, or at least so the courts have said. Thus, a challenge to conscription in a lawsuit challenging the registration requirement has been held unavailing on the ground that conscription could be unconstitutional without casting doubt on the validity of a system of registration.[1] It might also be held that the constitutionality of the system of conscription could not be raised in defense of any prosecution save for refusal to submit to induction or report for civilian work, upon the ground that the registrant has not gone far enough in the system to make his claim ripe for review.[2]

1. Stone v. Christensen, 36 F. Supp. 739 (D. Or. 1940).
2. The "ripeness" requirement was, of course, stated in Estep v. United States, 327 U.S. 114 (1946). *See* ¶ 2454 *infra*.

¶ 2307. Foreclosure of the Defenses—*Dennis v. United States*

It has been held that the defense that a statute is unconstitutional may not be raised by one whose alleged offense amounts to fraudulent, pretended compliance with the law, *e.g.*, perjury. This problem, most recently dealt with in *Dennis v. United States,*[1] is discussed at ¶ 2556 *infra*. It may arise when the defense of unconstitutionality is sought to be raised in a prosecution for, *e.g.*, making false statements on a registration form.

1. 384 U.S. 855, 865 (1966): "[P]etitioners are in no position to attack the constitutionality of § 9(h). They were indicted for an alleged conspiracy, cynical and fraudulent, to circumvent the statute. Whatever might be the result where the constitutionality of a statute is challenged by those who of necessity violate its provisions and seek relief in the courts is not relevant here. This is not such a case. The indictment here alleged an effort to circumvent the law and not to challenge it – a purported compliance with the law designed to avoid the courts, not to invoke their jurisdiction." *Compare* the dissents on this point of Justices Black and Douglas, 384 U.S. at 875 *et seq*.

¶ 2308. Problems of Proof

Proving the facts underlying a defense of unconstitutionality poses a problem only if the "necessity" or alternatives argument is used. See ¶ 2305 *supra*. In such a case it will be important to develop, from reliable sources, documents on a volunteer military. There is no dearth of such material. The Department of Defense, and other government agencies, have prepared studies on a volunteer military.[1] Organizations interested in the problem have developed bibliographies of materials on the subject of a volunteer army.[2] These materials are available by writing to the organization concerned. Material of a statistical and historical character can be admitted into evidence for the purpose of establishing the facts underlying the constitutional argument, with an offer to subpoena the compilers of some of the works in the event that there is to be further inquiry.[3]

1. *See* testimony of Assistant Secretary of Defense for Manpower Morris, Hearings before the House Committee on Armed Services, May 2, 1967, pp. 1920-26. *See also* United States v. Butler, 389 F.2d 172, 1 SSLR 3071 (CA6), *cert. denied,* 390 U.S. 1039 (1968).
2. The Council for a Volunteer Military, 1212 East 59th St., Chicago, Illinois 60637, has the most complete collection of materials, and issues a bibliography. For further information, *see* Miller, Why the Draft? (1968), a Penguin paperback; The Draft: A Handbook of Facts and Alternatives (Tax ed. 1967), published by the University of Chicago Press; Horton, *et al.*, How to End the Draft: The Case for an All-Volunteer Army (1967), a book by five Republican Congressmen.
3. For a discussion of problems of evidence arising in such a context, *see* ¶ 2208 n. 3 *supra*.

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2. *Illegal War*

¶ 2326. Illegality of War Registrant is Conscripted to Fight In

Increasingly today there is emphasis upon the so-called Nurnberg defense, based upon the alleged illegality of the war for which a registrant is conscripted to fight, and upon the manner in which that war is being conducted.[1] It is necessary to separate out the issues which are at stake in any such case, particularly because there is widespread confusion, which extends as well to judges, over the meaning of the Nurnberg defense.[2]

1. The Nurnberg Trial, 6 F.R.D. 69 (1946) reports the judgment of the Tribunal. The Tribunal was invested with power to try and punish crimes against peace, war crimes, and crimes against humanity as defined in the Charter which created the Tribunal. *Id.* at 76. The Charter defined the three classes of crimes as follows:

> "(a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
>
> "(b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.
>
> "(c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

Crimes against peace comprise one broad class, therefore, and in modern context are committed by nations which make war or initiate war in violation of treaty obligation, international understandings, or international customary law and by individuals who are accomplices to such deeds. War crimes and crimes against humanity comprise a second board class, dealing with the manner in which war is undertaken and the depredation of civilian populations in connection with the prosecution of a war or in preparation for it.

2. Garcia-Mora, *Crimes Against Peace*, 34 Fordham L. Rev. 1 (1965), discusses the development of the "crimes against the peace" provisions of the Nurnberg Charter. Several states have enacted laws dealing with "crimes against peace" and related political offenses. Italy, Germany, Japan, the Philippines, Republic of Korea, Burma and Venezuela, have included such provisions in their constitutions. Other laws punishing crimes against the peace and security of mankind and principally relating to propaganda have been enacted in the socialist world. *Id.* at 15. The place of the Nurnberg Tribunal in international law and the role it filled have been the subject of a great volume of legal writing. An excellent bibliography appears in 25 The Guild Practitioner 104 (1966). *See* Nerone, *Legality of Nurnberg*, 4 Duquesne L. Rev. 146 (1965); Walkinshaw, *The Nuremberg and Tokyo Trials: Another Step Toward International Justice*, 35 A.B.A.J. 299 (1949); McIntyre, *The Nurenberg Trials*, 24 U. Pitt. L. Rev. 73 (1962) (Extensive discussion of pre-Nurnberg law on war crimes); Kranzbuhler, *Nuremberg Eighteen Years Afterward*, 14 DePaul L. Rev. 333 (1965); Haensel, *The Nuremberg Trial Revisited*, 13 DePaul L. Rev. 1233 (1965).

¶ 2327. Issues in the Nurnberg Defense—The Basic Precedent

The Nurnberg Tribunals established as a basic principle that the legality of war, under international law, and the legality of methods used to fight a war were subjects of judicial cognizance by an international tribunal, and that guilt of crimes against the peace and crimes against humanity might be fastened upon individuals.[1] The Tribunal has been criticized as sanctioning a judgment of guilt according to ex post facto standards, imposed by the victors upon the vanquished, and at that by victors whose own conduct in the war was not free from blameworthiness.[2] However, more than twenty years later the claim of ex post facto can no longer be made, and the legitimacy of judging American conduct by standards set out in a treaty to which the United States is a party raises none of the same issues.

The question is whether under existing international agreements and in international customary law, the conduct of a particular war is "illegal." In answering this question, the Nurnberg treaty and judgment are only the starting place. The Nurnberg proceedings were governed by the Treaty of London, which established and incorporated the punishability of conducting aggressive war and of crimes against humanity.[3]

1. 6 F.R.D. 69, 77. Article 6 of the Nurnberg Charter provided for the punishment of "persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes: . . . ." The list set forth at ¶ 2326 n. 1 followed.

2. The Tribunal at Nurnberg spoke to this point:

> "The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law."

6 F.R.D. at 107. The Tribunal went on to state that international law is not only the province of treaties, but that it exists in the "customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists. . . ." *Id.* at 109. The Tribunal rejected defenses based upon the alleged ex post facto nature of the rules being applied. Criticisms of the Tribunal on this score appear in articles cited in the notes to ¶ 2326.

3. Treaty of London of August 8, 1945, 59 Stat. 1544. Article 6(a) states that waging of a war of aggression is a crime against the peace imposing "individual responsibility." *See* Douglas, J., dissenting from denial of certiorari in Mitchell v. United States, 386 U.S. 972 (1967). For a description of the founding and work of the Tribunal, *see* McIntyre, *The Nuernberg Trials*, 24 U. Pitt. L. Rev. 73 (1962).

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The treaty has been succeeded and enlarged--though not superceded--by the general prohibition against resort to force except in defense against an armed attack contained in the United Nations Charter.[4] This provision must be viewed in light of the general collective security framework of the Charter, which is designed to prohibit unilateral action by states except in the narrowest of circumstances, and to promote collective action by the United Nations Security Council and, perhaps, the General Assembly.[5]

Finally, there are the rules of customary international law which define the extent to which one state may intervene in civil conflict in another.[6] In the context of Vietnam, the question resolves into two: First, to what extent is the war a "civil war" dominated by an insurrectionary force seeking to topple the government of South Vietnam, and to what extent is it a war conducted across international frontiers, in which the government of North Vietnam is engaged with that of South Vietnam. Indeed, there is substantial legal question whether the "government" of South Vietnam is a *de jure* entity cognizable under international law.[7] The respective positions of the American and Vietnamese factions over the conduct of the war and of the negotiations for peace suggests the difficulty of getting an answer to this question.[8] The second question, given an answer to the first, is to what extent if any may the United States intervene in Vietnam, at the request of a government whose legal status is questionable, by use of troops and bombing of the territory to the North. These questions need not be and probably cannot be given a single answer; analysts of the situation in Vietnam stress the necessity of seeing North Vietnamese and South Vietnamese positions in historical perspective.[9] But the broader issue remains: What are the limits on permissible intervention under international law?[10] The United States has tended to rely heavily on its SEATO commitments in defending its action in Vietnam.[11]

4. Article 51, United Nations Charter.

5. The "Uniting for Peace" resolution of November 3, 1950, U.N. General Assembly, 5th Sess., Doc. a/1981 purports to vest residual authority in the General Assembly when the Security Council is unable to discharge its collective security responsibilities. There is dispute over the validity of the resolution. *See* Memorandum of Lawyers Committee on American Policy Toward Vietnam, reprinted in 112 Cong. Rec. 2552 (1966). *See* Comment, *The "Uniting For Peace" Resolution of the United Nations,* 45 Am. J. Int. L. 129 (1951).

6. "The duty to respect independence is a necessary rule of international law. Unless it is abrogated by treaties, this rule prohibiting intervention addresses itself to all states." Morgenthau, Politics Among Nations 246 (1948). *See also* Duchacek & Thompson, Conflict and Cooperation Among Nations 163 (1960): "We may conclude, for the moment, that the consent enjoyed by a great power tends to diminish when its force is used in ways that are regarded as illegitimate, whether against a small state or another great power. The validity of this conclusion is attested by the efforts which virtually all states make today, through their diplomacy and propaganda, to identify any use of their armed forces with legitimacy." *See also* nn. 8-9 *infra* for material setting out the views of scholars on both sides of the question.

7. The United States State Department has contended that South Vietnam is being subjected to armed attack from the North. Its Memorandum of Law is reprinted in The Vietnam War and International Law (Falk ed. 1968), an invaluable source book on this question, and at 75 Yale L. J. 1085 (1966). The opposite position is taken by the Lawyers Committee on American Policy Toward Vietnam, in a statement reprinted in the Congressional Record, 112 Cong. Rec. 2552 (1966).

8. An extensive debate on this question was conducted in *Yale Law Journal.* Falk, *International Law and the United States Role in the Vietnam War*, 75 Yale L. J. 1122 (1966), fired the opening shot. Moore, *International Law and the United States Role in the Vietnam War*, 75 Yale L. J. 1051 (1967) is a reply, and Professor Falk's rejoinder is at 75 Yale L. J. 1095 (1967). The debate is also reprinted in the Falk book cited in note 7 *supra*. William Standard and Everhard Deutsch debated the legality of the Vietnam war in the American Bar Association Journal. Standard, *United States Intervention in Vietnam Is Not Legal*, 52 A.B.A.J. 627 (1966); Deutsch, *The Legality of the War in Vietnam*, 52 A.B.A.J. 436 (1966).

9. Much of the historical material is summarized in the Viet-Nam Reader, edited by Marcus Raskin and Bernard Fall, published in paperback in 1966. *See also* Fall, Viet-Nam Witness (1966); Kahin & Lewis, *The United States in Vietnam* (1967) (accentuates the history of Vietnam since 1953 and collects many pertinent documents that are not easily available).

10. Note 8 *supra* and accompanying text.

11. *See* note 7 *supra* and accompanying text.

¶ 2328. Issues--War Crimes and Crimes Against Humanity

Another, and separate, issue, is the means by which the war is conducted, and the impact of war upon civilian populations. Philosophers since St. Augustine, at least, have sought to distinguish between "just" and "unjust" wars, and one principle determinant is the manner in which the war is conducted. In particular, is the war conducted primarily against military targets or are civilian populations swept into the fighting and destroyed? Is the war conducted with humane or inhumane weapons? Is its objective the annihilation of a people or merely victory to attain limited and proper ends?[1] These questions have found their way into conventions on the limits of warfare, and also into rules of customary international law governing the per-

1. Three source books upon the philosophical questions arising in this context are: Baintin, Christian Attitudes Towards War and Peace (1960) (especially chapter 4); Douglas, The Nonviolent Cross (1968); Zahn, War, Conscience and Dissent (1967).

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missible limits upon the techniques of warfare and the extent of violent coercion and destruction in warfare.[2] Violation of these conventions, or these rules, is by the Nurnberg precedent a crime under international law.[3]

2. The Nurnberg Tribunal relied upon general international law concerning the use of force as well as upon specific treaty provisions. 6 F.R.D. 69, 107-110. *See also* Brownlie, International Law and the Use of Force by States 110 (1963): "It is submitted that the practice of states between 1920 and 1945, and more particularly between 1928 and 1945, provides adequate evidence of a customary rule that use of force as an instrument of national policy otherwise than under a necessity of self-defense was illegal." For a discussion of how these principles may be applied under American law, *see* ¶ 2329 *infra*.

3. 6 F.R.D. at 107-110.

¶ 2329. Issues—Legality Under American Law

There are two ways in which one can speak of the legality of a war under American municipal law: first by virtue of the principle that the rules of international law form part of the body of American federal law, whether those rules are or are not codified and ratified in the form of treaties;[1] and second, whether or not the domestic constitutional rules concerning separation of powers have been observed in mounting and carrying on a given war.[2] The first question is dealt with in ¶¶ 2327-28 *supra*. The second is the subject of this paragraph. Congress has the power to declare war, to raise an army, and to provide for calling forth the militia to repel invasion.[3] The Executive has the power to command the armed forces of the United States and the militia in federal service to repel "sudden attacks."[4] The interpretation of these provisions is a matter of some complexity, and the current attitude of the United States government is apparently that they are virtually obsolete insofar as they require a Congressional declaration of war, for the Congress cannot "move quickly enough" in a "shrinking world." Therefore, it is reasoned, declaring war is largely out of date, and the Executive branch will be conducting American foreign and military policy from this point on.[5]

The contrary argument begins with an historical view of the principle of separation of powers. As Joseph Story said in his *Commentaries on the Constitution*, the Constitutional Convention recognized that war might have a calamitous effect upon the nation, and it was thought, therefore, that war should not be waged without review by all the tribunals of the nation, by contrast with the English system vesting war-making power in the Executive in the person of the sovereign.[6] The contemporary vitality of this view is perhaps in issue, but the evidence is persuasive that it states the understanding at the time the Constitution was adopted. Therefore, one must ask whether an Executive decision to commit forces to a foreign engagement, and then to continue to raise force levels and to extend the scope of the conflict without meaningful consultation with the Congress, let alone a formal declaration of war, is permissible as a matter of American municipal law. This is the third issue which is raised under the rubric of "illegality" of a war.

1. Art. 6, cl. 2, of the Constitution states that "Treaties are a part of the Supreme Law of the Land; and the Judges in every state shall be bound thereby." Moreover, international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are presented for their determination. The Paquete Habana, 175 U.S. 677, 670 (1900). The current foreign relations *Restatement* approves the *Paquete Habana* decision, saying that international law is part of the general, non-statutory, "common" law of the United States. Restatement, Foreign Relations Law of the United States, § 3 at 13-14 (1965). This view is a natural outgrowth of federal supremacy in matters of foreign relations, *see* Zschernig v. Miller, 389 U.S. 429 (1968), and is not drawn into doubt by the prohibition on federal courts prescribing common law rules when sitting in diversity, a rule designed to respect the federal character of the American Union. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). *See generally* Wright, Federal Courts §§ 54-60 (1963).

2. *See* note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 Harv. L. Rev. 1771 (1968), a detailed essay on the war in Vietnam. *See also* Comment, *The President, the Congress, and the Power to Declare War*, 16 Kansas U. L. Rev. 82 (1967).

3. U.S. Const., art. 1, § 8.

4. U.S. Const., art. 2, § 2. *See* the Vietnam War and International Law 597 (Falk ed. 1968).

5. *See* authorities cited in note 2 *supra*. *See also* The Vietnam Hearings (Fulbright ed. and intro. 1968), and the Dept. of State memorandum, reprinted in The Vietnam War and International Law 583, 597 (Falk ed. 1968), for Executive Branch views on this question.

6. Story, Commentaries on the Constitution § 1166 (1st ed. 1827). *See also* Federalist Nos. 24-26.

¶ 2330. Justiciability

Given the three issues listed above, what hope has a criminal defendant of raising them in defense of a prosecution for refusal of induction or some other selective service offense in the face of a claim that the war is a "political question"? It has been thought well by scholars and judges to distinguish, in deciding whether judicial review is to be available, between classes of litigants: civil plaintiffs, civil defendants and

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criminal defendants.[1] Each has a different stake in the outcome of the proceedings he is involved in, and each is viewed differently in the case law of justiciability. A civil plaintiff seeks to change the status quo, and his claim to judicial review is looked at most harshly. The civil defendant is given more consideration, and a criminal defendant, it is generally believed, is entitled to have his case scrutinized most carefully because of the disabilities attendant upon conviction of crime. In assessing the "justiciability" of war issues, it should be recalled that a civil plaintiff may be seeking to "stop the war" by affirmative injunctive relief. A criminal defendant, on the other hand, seeks nothing more than a declaration that he cannot be put in jail for not wanting to serve in the armed forces or perform some related duty. Therefore, his claim should be the easiest upon which to secure judicial review. The uniform response of the courts has been, however, that the legality of the war will not be subjected to review by civil or military courts.[2] The stated ground is most generally that these are matters confined to the Executive and to Congress, and that the courts cannot inquire into the exercise of Executive and congressional discretion even to the extent of determining the legality under international law of a particular conviction for crime.[3]

This posture, it has been argued, is at odds with the principle that the "law of the land," which by a consistent course of decision is to be declared by the Supreme Court whenever an individual controversy requires, includes international treaty obligations of the United States, domestic principles of separation of powers, and perhaps even the rules of customary international law.[4] The Supreme Court has before now declared itself upon the most fundamental issues of federal-state relations, in cases involving domestic insurrection.[5] And it has reviewed the ambit of international conflict in order to resolve claims to a particular piece of property.[6] It has never, of course, entertained the use of the injunctive power in these cases, but that is not the issue when liberty is at stake.

This analysis has, it should be said, some scholarly[7] and historical support.[8] It has not, it should be underscored, met as yet with judicial approval.[9]

1. On "standing" and "justiciability", *see generally* Jt. Anti-Fascist Refugee Cttee in McGrath, 341 U.S. 123, 155 (1951)(Frankfurter, J., concurring); Barrows v. Jackson, 346 U.S. 249 (1953); Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Society of Sisters, U.S. ( ). It is generally said, though not so confidently now as formerly, that courts do not decide political questions. *See generally* Hart & Wechsler, The Federal Courts and the Federal System 192 (1953). Hart and Wechsler state that in the field of foreign relations, the political question doctrine is of special importance, for it would be unwise and perhaps dangerous for the government to seem to speak with more than one voice on questions of foreign affairs. Other considerations adduced in "political question" cases include the courts' inability to gather information about a given topic and the lack of control over the consequences of decision. Therefore, determination of the pendency of a state of war for the purposes of deciding whether a statute of limitations had run has been held a political question. The Protector, 79 U.S. (12 Wall.) 700 (1871). A question respecting boundaries of nations has been held to be more a "political" than a "judicial" question. Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829). The abrogation of treaties was said to be within the power of Congress and not a matter for judicial inquiry. The Chinese Exclusion Case, 130 U.S. 581 (1889). None of these cases, however, involved a criminal defendant, seeking to assert that he should not be punished for an act protected under and perhaps required by international law. In Baker v. Carr, 369 U.S. 186 (1962), the Court swept away the "political question" teaching which had theretofore kept it out of the reapportionment controversy, and remarked that while foreign relations is not generally a judicial matter, "it is error to suppose that every case or controversy which touches foreign relations lies beyond the judicial cognizance." 369 U.S. at 211. In determining whether to decide a question or to refuse to decide it on "political question" or "separation of powers" grounds, the nature of the right asserted by the party seeking the determination may be important, just as in determining whether a defendant has "standing" to assert a constitutional claim, the character of the right he asserts may be determinative. Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L. J. 599 (1961). *See also* Flast v. Cohen, -- U.S. -- (1967). One can find in the World War II Japanese exclusion cases support for the proposition that the legality of the war in Vietnam may be the subject of judicial inquiry when the question comes up in a criminal case. In Hirabayashi v. United States, 320 U.S. 81 (1943), and Korematsu v. United States, 323 U.S. 214 (1944), the curfew and internment provisions against the Japanese were upheld under the war power, but the Court did go to and decide the merits rather than resting, as it might have, on the "political question" doctrine as a justification for refusing to consider them.

2. United States v. Mitchell, 369 F.2d 323 (CA2 1966), *cert. denied*, 386 U.S. 972 (1967); Luftig v. McNamara, 252 F. Supp. 819 (D. D.C. 1966); *aff'd*, 373 F.2d 664 (CA DC), *cert. denied sub nom.* Mora v. McNamara, 389 U.S. 934 (1967).

3. United States v. Johnson, 36 U.S.L.W. 2198 (U.S.Ct.Mil. App. 1967).

4. *See* ¶ 2329 n. 1, and authorities there cited.

5. Cooper v. Aaron, 358 U.S. 1 (1958).

6. In Bas v. Tingey, 4 U.S. (4 Dall.) 37 (1800), the Court decided that France was an "enemy" in determining property rights in a ship.

7. *See* Hughes, *Civil Disobedience and the Political Question Doctrine*, 43 N.Y.U. L. Rev. 1 (1968).

8. *See* Story, ¶ 2329 n. 6 *supra*.

9. *See* cases cited note 2 *supra*. *Compare* Douglas, J., dissenting in *Mitchell* and *Mora, supra* note 2.

¶ 2331. Relevance of Issue to Particular Cases

The legality of American involvement in a particular conflict is most clearly relevant to a prosecution for refusal to submit to induction, as the odds are strong that the inductee will be fighting in, or connected with the prosecution of, that conflict. Refusal of civilian service, it has been said, does not raise the issue of legality of armed conflict abroad.[1] Refusal to register may similarly be said not to raise this question, as a

1. In Holmes v. United States, 391 U.S. 936, 1 SSLR 3084 (1968), Mr. Justice Stewart stated, in noting his reasons for voting to deny certiorari, that the cases involved the power of Congress to enact a conscription law, and that the defendant's refusal to report for civilian service did not present the broader question of the legality of sending men abroad to fight in an undeclared war.

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system of registration may be valid quite apart from the validity of American military policy.[2] In each case, therefore, it will be necessary to appraise the relevance of the prosecution to the issue presented,[3] and this is a threshhold question to be resolved before questions of justiciability are reached, and surely before those of substantive legality are dealt with.

2. Stone v. Christensen, 36 F. Supp. 739 (D. Or. 1940). The case discusses the problem in standard severability language, and is apparently the sole authority on point. It contains no analysis or reasoning which entitled it to particular weight.

3. *See* Griffiths, *Some Notes on the Solicitor General's Memorandum in Oestereich*, 1 SSLR 4012, 4014 (1968).

¶ 2332. The Tactical Decision to Make the Defense

Not in every case will counsel wish to raise the legality of the war as an issue. Even where it may be said to be relevant, the wishes of the client and the lawyer's sense of the tactical situation will resolve the question. If the legal issues are straightforward and clear, it may be unwise to inject the war into the case. However, it should be said that many selective service clients have quite strong, although perhaps undefined, views on the legality of the war. The attorney predicts results of a given course of in-court or out-of-court action, and advises the client as to the probable consequences of his behavior.[1] But the lawyer's role does not, many have argued, end there.

Having made his prediction and having helped the client to see the legal issues in the context of the American legal system as well as the broader framework within which problems of international law are worked out, a decision must be made whether to put on a "legality of the war" defense. The lawyer should be alert to his client's attitudes with regard to the legality of the war, and must decide whether this dilution of his control over the case is consistent with his view of his role. Since the issue must sooner or later be faced, it should be dealt with explicitly in making the decision whether to accept the case in the beginning.

1. Legal realism has gone out of fashion in some quarters. Its major outlines are sketched in caricature in Fuller, *The Case of Speluncean Explorers*, 62 Harv. L. Rev. 616 (1949).

¶ 2333. Raising the Issue—Problems of Proof

There are a number of ways to introduce the antiwar issue, but the basic problem is one of factual data. To raise the issue of illegality of a particular war under international law, it is permissible to begin with an offer of proof, organized as to issue, and supported with books, documents, articles, reports, Congressional record material, and affidavits from persons who might testify. Some of this material, particularly historical analysis, may be judicially noticed. Other parts of it must be introduced subject to the availability of witnesses who can testify as to the method by which the data was collected. The provision of F.R.Crim. P. 17(f), relating to depositions, are available to secure the taking of depositions abroad for those witnesses unable to come to the United States.[1] See ¶ 2208 n.3 *supra* on the scope of judicial notice in this sphere.

A somewhat similar approach should be followed in presenting the issue of "war crimes" and "crimes against humanity," with a detailed offer of proof in outline form, supported with documents. In this category would fall use of prohibited weapons, attacks on civilian populations, and other questions relating to the conduct of American forces abroad.

The issue of municipal law involves fewer factual issues, although where, as in the Vietnam conflict, it is sought to justify Executive action based upon a Congressional resolution, the factual basis upon which the resolution was presented and supported may bear upon the interpretation of it and the weight that it is to be given.

These offers of proof will generally produce a judicial ruling that the evidence is or is not admissible, and the manner and order of proof may be decided upon as any other question.

1. If a witness is important to the merits of the defendant's case, the government cannot deny counsel assistance in gaining admission to a foreign country to interview him. United States v. Powell, 156 F. Supp. 526 (N.D. Calif. 1957).

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3. Constitutional Procedural Defects

¶ 2351. Fundamental Procedural Defects in the System

Cutting across all selective service cases, though with principal relevance to draft refusal cases, are procedural infirmities in the System, including denial of the right to counsel, denial of the right to produce witnesses before the local board, and denial of the other rights which are thought essential in adversary procedure and which are embodied in the Administrative Procedure Act for most agencies of government.[1] Challenges to denials of these rights may take place in the context of an individual registrant's case, but will no doubt be more effective if raised as well as a general attack upon the allegedly defective procedures. To this end, the attorney with a selective service case will need to write a brief which puts the denial of rights into context by bringing empirical studies of broad application to bear upon legal analysis for a particular case.

1. The Administrative Procedure Act, now principally 5 U.S.C. §§ 551 *et seq.*, provides a basic standard of fairness for administrative proceedings. However, the Selective Service System is statutorily exempt from all but § 3 of the APA. *See* ¶¶ 27, 31 *supra.* A most important part of the APA is the rule-making section, and the System's failure to give advance notice of proposed rulemaking is subject to serious constitutional question on the basis that APA-type notice of proposed rulemaking may be a due process requirement. *See* Fuchs, *Procedure in Administrative Rule-Making*, 52 Harv. L. Rev. 259 (1938), for a discussion of the policy questions. For the suggestion of unconstitutionality, *see* Newman, *The Berkeley Crisis*, 54 Calif. L. Rev. 118, 121-22 (1966). The nonapplication of the APA to the Selective Service was noted and upheld in United States v. Wierzchucki, 248 F. Supp. 788 (D. Wisc. 1965). A more expansive view of the role of fair procedure in administrative inquiries is taken in Greene v. McElroy, 360 U.S. 474, 496-97 (1959).

¶ 2352. Denial of the Right to Counsel

Much has been written about the denial of the right to counsel, and as noted in ¶¶ 1003-06 *supra*, the courts have generally cast aside the challenge upon the ground that selective service proceedings are non-adversary in nature, an assertion belied by reality and not notably in accord with the contemporary view of the lawyer's role. The starting point in establishing prejudice from the denial of the right to counsel is the age of the registrant, the complexity of the regulatory system with which he must deal, and the inadequacy of the System's means of providing information and advice. This material can be drawn from the Marshall Commission report for purposes of presenting it to the Court.[1] The second theoretical peg for asserting a right to counsel is the lawyer's role in monitoring the performance of the System, as to which the Supreme Court's discussion in *United States v. Wade*[2] should be helpful. The third source of argument is to be found in the low visibility of most Selective Service decisions, a point related to the second. Welfare workers[3] and police[4] have been studied to determine upon what basis they make decisions having impact upon those subject to their jurisdiction. Studies of welfare practices and arrest practices reveal that in the absence of restraints upon authority, persons with such power develop a set of informal guidelines which bear little resemblance if any to the formal criteria which are publicly stated to control their conduct. The Marshall Commission has documented that much the same thing happens with local board members who are largely immune from effective review of the bulk of their actions.[5] The right to counsel provides a means of enforcing compliance with formal criteria of judgment.

Proof of the prejudicial impact of denial of counsel will require collection of material from past studies supplemented if possible with current data. A psychologist or psychiatrist may in an appropriate case, be sought out to testify on the supportive role that counsel might play in local board proceedings. His testimony, if it is to be offered, should be reduced to an outline offer of proof so that if it is not admitted in the pretrial or trial challenge to denial of counsel, the offer of proof will form a basis for appeal.

1. Nat'l Advisory Comm'n on Selective Service, In Pursuit of Equity: Who Serves When Not All Serve? (1967) (Supt. of Docs., Washington, D.C.).
2. 388 U.S. 218, 228-39 (1967). *See* ¶ 1003 *supra.*
3. *See* Handler, *Controlling Official Behavior in Welfare Administration*, 54 Calif. L. Rev. 479 (1966), and authorities there cited.
4. Reiss, Police Brutality: Answers to Key Questions, Trans-Action, July-August 1968, Vol. 5, # 8, p. 10; Note, 100 U. Pa. L. Rev. 1182 (1952). *See also* Davis & Dolbeare, Little Groups of Neighbors: The Selective Service System (1968).
5. Note 1 *supra.*

¶ 2353. Denial of Other Procedural Rights

Denial of transcript, right to have witnesses, confrontation, cross-examination of adverse witnesses, and of other procedural rights raises questions not analytically different from denial of counsel. It is suggested that the same approach be used, and that the Marshall Commission study and the other materials dealing

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with the effective contemporaneous checks upon arbitrary exercise of power by boards and officials of the System should be integrated with a particular registrant's factual situation for more effective presentation.

4. *Substantive Illegality of Classification Standards*

¶ 2376. Substantive Challenges to Classification Practices

The classification structure of the Selective Service System is designed to channel manpower not only into the military but, through the use of deferment policy, into civilian occupations decided by the President and the Congress to be important enough to warrant granting a repreve from military service.[1] The System is overtly and designedly "selective," and this feature of it invites challenge to its system of classification on constitutional grounds. Among the bases for constitutional attack is the due process clause, and its guarantee of at least minimal equal protection of the laws.[2] Some classifications may be considered to make an invidious discrimination between those deferred or exempted and those not. The I-O classification has been attacked (successfully) on this ground,[3] and the II-S classification has as well been the subject of litigation.[4] The conscientious objector classification, as discussed at ¶ 1038 *supra,* and the ministerial and divinity student exemptions, ¶¶ 1065-69 *supra,* tender difficult constitutional questions under the free exercise and establishment clauses of the first amendment. The considerations adduced at the cited paragraphs in favor of a broad construction of these classifications would apply as well in a constitutional challenge to them either on their face or as applied in an unduly restrictive manner.

However, arguments of unconstitutionality are generally met with the assertion that all deferments are matters of legislative grace and hence not subject to any challenge. This contention is dealt with at ¶3 *supra.*[5]

1. The official ideology of "channeling" has been set out in a number of publications. The ideology begins with the statement in 10 U.S.C. § 311 that "The militia of the United States consists of all able-bodied males" between 17 and 45 (with some exceptions), and that the "unorganized militia" is to consist of "members of the militia who are not members of the National Guard or the Naval Militia." The concept of the "unorganized militia" – everybody in the prescribed age group – is the basis for the claim by Selective Service officials that every male is "precommitted" to military service under a system of universal liability. *E.g.,* Hershey, *The Operation of the Selective Service System,* Current History, July 1968, Vol. 55, No. 323, at p. 3. This theory of universal liability and its counterpart, the notion that all deferments and exemptions are a matter of legislative grace, is dealt with at ¶ 3 *supra.*

2. Bolling v. Sharpe, 347 U.S. 497 (1954).

3. In United States v. Seeger, 326 F.2d 846 (CA2 1964), *aff'd on different grounds,* 380 U.S. 163 (1965), the Second Circuit held that § 6(j) of the Act unconstitutionally distinguished between internally-derived and externally-compelled beliefs.

4. Talmanson v. United States, 386 F.2d 811 (CA1 1967), *cert. denied,* -- U.S. -- (1968); Boyd v. Clark, -- F. Supp. --, 1 SSLR 3140 (S.D. N.Y. 1968).

5. *See also* Professor Robert O'Neil's article on unconstitutional conditions in draft classification policy, in December 1968 George Washington Law Review.

¶ 2377. Problems of Standing and Proof

Two problems--standing and proof--are central to a defense based upon constitutional infirmity in the classification process.

Standing to challenge a classification standard may arise in two ways. First, a registrant may have claimed a given classification and not have been given it; he can then claim not only that there was no basis in fact, or that the standard should as a matter of interpretation be applied in a particular way, but also that the standard, and the result is not that the court writes a new one but that it holds that the registrant cannot be successfully prosecuted for in any event he should not have placed in a class available for service (I-A, I-A-O, or I-O). This result lacks symmetry, for if a classification standard is invalid, and it is the only classification to which the registrant may be said to be entitled, how is he to be classified? The problem may be met, however, with the simple assertion that he is not guilty of refusing service.[1]

The second way in which a registrant may show the requisite standing is to claim and show that he would not have been called at the time he was called if the classification process has been differently arranged. For example, if a registrant who is not attending college is classified I-A and ordered to report for induction, he may wish to claim that the II-S classification is an unlawful discrimination against those without means to attend college. He would then claim that if all II-S registrants were put into the pool of I-A's he would not be inducted at the time when he was called. This approach has been rejected by one court and

1. United States v. Seeger, 326 F.2d 846 (CA2 1964), *aff'd on other grounds,* 380 U.S. 163 (1965).

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approved in a slightly different context by another.[2] Perhaps in order to strengthen his claim the registrant should examine the classification record, SSS Form 102, at his own local board to show that if the II-S registrants of his own board were I-A he would not have been called at the time when he was called.[3] This is however, a somewhat artificial approach, because if all the II-S registrants in the United States were I-A, the pattern of quotas, debits and credits would very likely change, not to mention the raft of claims that would be filed for deferments other than II-S. However, this method, or one quite similar, is essential for a registrant whose claim does not rest upon his having been denied a classification such as II-S, I-O or IV-D, but rather seeks "indirectly" to challenge the validity of a given classification.

Once the problem of standing is settled, there remains the problem of proof. For constitutional problems of free exercise, establishment of religion, and due process, perhaps very little factual evidence will be necessary, although the Supreme Court in assessing the conscientious objector classification thought it important to probe the contemporary understanding of religion in order to make constitutional decisions involving these provisions.[4] The proof of an equal protection claim requires greater attention to the actual effect of a given classification. It is a matter of dispute whether the II-S classification discriminates against the poor because only the middle-class and wealthy can afford to go to college, and judgments appear in the legislative history of the II-S section, § 6(h)(1), that no such discrimination will be produced by wholesale granting of a II-S to everyone in a four-year college. One has also to contend with the fact that II-S recipients give up other deferments, a move intended to make the deferment a "postponement" rather than an exemption from all service. Moreover, those who receive deferments obtain extended liability to age 35 a quid pro quo which is, however, of doubtful relevance given the present order of call and present levels of draft call.[5]

As to timing, the defense of unconstitutionality should be raised in a trial memorandum in written form rather than before trial, for it rests upon the examination of the defendant's selective service file and therefore in a trial of the "general issue."

2. The approach was rejected in Talmanson v. United States, 386 F.2d 811 (CA1 1967), *cert. denied*, -- U.S. -- (1968). However, in United States *ex rel.* Lynn v. Downer, 140 F.2d 397 (CA2), *cert. denied as moot*, 322 U.S. 756 (1944), the court held that if a registrant could show that as a result of an invalid classification policy he was called sooner than he would otherwise have been, due to the impact of the illegal practice on the size of the draft-eligible pool of men, he would be entitled to habeas corpus. The injury would then be so direct and immediate that he would have standing to complain of it. A perceptive review of the standing cases in federal jurisprudence appears in Joint Anti-Fascist Refugee Cttee. v. McGrath, 341 U.S. 123, 155 (1951) (Frankfurter, J., concurring).

3. *See* Ortega, *On Researching the Classification Record*, unpublished memo., available from SSLR in facsimile ($1.00).

4. United States v. Seeger, 380 U.S. 163 (1965).

5. The II-S question is canvassed in Boyd v. Clark, -- F. Supp. --, 1 SSLR 3140 (S.D. N.Y. 1968), and in the briefs of the parties.

D. Particular Offenses -- Section 12(a)

¶2401. Particular Offenses--Section 12(a)--Generally

Section 12(a) offenses are many, and it is not possible to list every possible permutation of the statute and regulations. Below are discussed the offenses which have been generally recognized as important by the government in bringing prosecutions under § 12(a). On defining offenses, see ¶¶2002-05 *supra*.

1. Refusal to Submit to Induction

¶2402. Refusal to Submit to Induction--Generally

Refusal to submit to induction is one of the two most-often-prosecuted offenses under the Act, the other being refusal to report for civilian work. It is the offense of which a registrant classified I-A must risk conviction in order to test the validity of his classification or processing, unless he decides to use federal habeas corpus or unless some special circumstance leads a court to grant pre-induction review. See Part IV of this *Manual*, for a discussion of the limits on availability of federal habeas corpus and preinduction review.

Refusal of induction is a serious step, it need hardly be said. The following paragraphs are descriptive of the lawyer's role when advising a client who is determined (probably because he wishes to challenge the legality of board action with respect to him) to refuse to submit. Obviously, the lawyer will, during the

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period leading up to induction day, be open to indications by his client of a desire to change his mind and either enter the Armed Forces without reservation, or enter and seek habeas corpus to test allegedly illegal System action. The advice in ¶ 2403, particularly, is to be seen in this light. If, however, the client is to refuse, ¶ 2403's admonitions on procedure and tactics are vitally important.

¶ 2403. Pre-Offense Advising

The induction refuser will usually consult counsel at or before the time he receives his induction order. Therefore, it will be possible to use the administrative and other negotiation procedures set out at ¶ 2104 *supra*, and to consider the advisability of affirmative litigation as spelled out in Part IV of this *Manual*.

The attorney with such a client, unable to secure a postponement or cancellation of the induction order, see ¶¶ 1120, 1124 *supra*, should be in a position to help inform the client what to expect at the induction station and should contact the prosecutorial authorities to ensure that his client is not harrassed or interrogated at the induction center.[1] The client should be aided in composing a letter addressed to the Commanding Officer, Armed Forces Examining and Entrance Station (AFEES). The letter may be typed or handwritten, and should be signed by the client. It should explain that the client is refusing to submit to induction in order to test the legality of the local board action in classifying him or processing him. If he is acting based on counsel's advice that the board did act illegally, this should be stated as well.[2] It is the more prudent practice for the letter to state that the client has discussed the matter with his lawyer, and does not wish to make any statements or be interrogated by anyone concerning his refusal to submit to induction. The letter should be taken with the client to the induction center and given to someone in charge. The client should insist that the person to whom he gives the letter open it and read it, should ask that the letter be brought to the attention of the highest ranking officer in the AFEES and should refuse to discuss the letter's contents, relying if necessary upon his privilege against self-incrimination.

The attorney should contact local prosecutorial officials, particularly in areas where it is the practice to arrest refusers to submit to induction. He should explain the situation and, if he can in good faith do so, say that the client will appear as required and attempt to secure agreement that the client will not be arrested. He may even wish to arrange to be present at the induction station, by talking with the Assistant United States Attorney and with the commanding officer. Or, he may just want to show up at the station with his client and deal with matters from there. The attorney's presence may prevent a post-refusal interrogation of the client by the FBI or Military Intellegence. Often the attorney who just shows up is permitted to observe the induction ceremony.

The client should then be told what to expect at the induction center in the light of the letter he has been given and his lawyer's conversations with prosecutorial and Army officials. He should be told to go through all the procedures up to his entry into the room where the induction ceremony is to be held, as prescribed in AR 601-270. If he is not disqualified before entering the room where the induction ceremony is to be held,[3] he should be told that if he steps forward when his name is called, he will be in the Armed Forces, even if he refuses to take the oath which will thereafter be administered.[4] If he does not step forward, he will be given one more chance off in a private room.[5] He should continue his refusal. He should not answer questions or sign the statement "I have refused to submit to induction" which will almost surely be offered to him.[6] Signing such a statement only creates one more piece of government evidence for use at trial. If he meets any unusual action by the Army authorities, such as orders to put on a uniform, or get on

1. It was not the practice, as of late 1968, to arrest induction refusers in any jurisdictions except the Southern District of New York, Colorado, and Alaska. As to Alaska, *see* Beierle v. United States, -- F.2d --, 1 SSLR 3157 (CA9 1968).

2. Some attorneys prefer that the letter be a rather full statement of the client's position, including where relevant a condemnation of the "war crimes" being committed by inductees. Such a letter will find its way into evidence at a subsequent trial, and counsel must carefully weigh the impact it will have some months from the passion which gave rise to it and the events which give it importance.

3. He may be disqualified at the induction center based upon the physical inspection given even to those who have had their physical examinations, *see* Briggs v. United States, -- F.2d --, 1 SSLR 3144 (CA9 1968), or the Armed Forces Security Questionnaire, which may be administered at the time just prior to induction rather than with the physical or at some other time. *See* AR 601-270, AR 604-10 (both reprinted in SSLR's *Statutes & Regulatory Material* section) for a description of induction station procedure.

4. Putting on a uniform, drawing pay, and the like, may make a refuser a "de facto" soldier. *See* ¶ 1127 *supra*. The step forward signifies entrance into the armed forces. The oath of allegiance is given after the step forward and is not essential. A registrant who takes the step forward and refuses to take the oath of allegiance will be informed that he is already in the military. AR 601-270, ¶ 37.

5. AR 601-270, ¶ 37 provides that any registrant who refuses to step forward will be removed "quietly and courteously" and handled in accordance with AR 601-270, ¶ 40c, which provides that the registrant must be warned of the criminal penalties for refusing induction and given one more chance to step forward. Whether failure to follow this procedure is prejudicial error in the induction process is an open question, although the court said in Edwards v. United States, 395 F.2d 453, 1 SSLR 3100 1(CA9 1968), that minor departures from the prescribed regulations would not invalidate the process. *But see* Briggs v. United States, note 3 *supra*; ¶ 2404 n. 4 *infra*. On the importance of executive agencies following their own rules, *see generally* Service v. Dulles, 354 U.S. 363 (1957); Vitarelli v. Seaton, 359 U.S. 539 (1959).

6. AR 601-270, ¶ 40c requires that the statement be offered to him.

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a bus to go to army camp, or otherwise subject himself to military discipline, he should refuse and should insist upon calling his lawyer.[7] Incidents such as these have been recorded, and it is for this reason that many attorneys prefer to attend the induction ceremony, if possible, or at least to discuss the matter with the commanding officer beforehand.

The client should carefully observe each step in the process leading to the order to step forward, for it may be that the Army, in its hurry to process a registrant whom it is known will refuse, will omit to perform some duty required by AR 601-270, which is reprinted in SSLR's *Statutes & Regulatory Material* section.[8]

7. *See* ¶1127 *supra* on the effect of becoming a "de facto" soldier.

8. *See* notes 1-6 *supra* and authorities there cited. Oshatz v. United States, -- F.2d --, 1 SSLR 3209, 3301 (CA9 1968) is a good example of an induction-day error at the AFEES which resulted in reversal of the defendant's conviction for refusal to submit.

¶2404. Elements of the Offense

The elements of the offense of a refusal to submit to induction are:

1. Refusal to step forward when one's name is called the second time, as provided in AR601-270.[1]
2. Having the required criminal intent, defined in the statutes as "knowingly."[2]
3. A prima facie valid order to report for and submit to induction.[3]

The refusal to step forward is fairly mechanical and simple, although it has been held that if stepping forward is impossible, an acquittal must be granted on that ground.[4]

The element of intent is also fairly loosely construed, and there is not much reason under present case law to ground a defense on lack of intent unless the defendant was unable to understand the proceedings at the center, did not understand what was required of him, or acted without deliberation.[5] Given the requirement of two additional orders to step forward in a private room, AR 601-270, ¶ 40c, lack of intent is difficult to establish. However, it may be argued that the element of intent should be broadened to comprehend the extent of the "wilfulness" requirement in income tax prosecutions. That is, if a registrant has a good faith belief that his refusal is justified, based upon advice of counsel to whom he has disclosed all the relevant facts, he ought not to be convicted of evading service.[6] His acquittal would not end his liability, however, for the System would be able to resort to a civil suit to obtain a declaration that order to report for induction was valid, or else ask the court (in a nonjury case) for special findings upon the validity of the induction order.

The third element, validity of the induction order, has only recently been the subject of consideration by the courts. In the old cases, it was the habit of courts to refer to the "presumption of regularity" of official acts and permit the government to establish a prima facie case that the order was valid by calling a board official to identify a copy of the order and pull out a few more pieces of the defendant's selective

1. *See* Edwards v. United States, -- F.2d --, 1 SSLR 3100 (CA9 1968); Chernekoff v. United States, 219 F.2d 721 (CA9 1955). *But see* Mansavage v. United States, 178 F.2d 812 (CA7), *cert. denied*, 339 U.S. 931 (1950), noting that refusal to submit to induction is a more inclusive offense than failing or refusing to step forward. A registrant who reports to the induction center but refuses to take preinduction tests of various kinds might be said to have refused to submit to induction, though he never reached the induction room. In each case, the question would be the extent of variance between the indictment and the prosecution's proof. The *Mansavage* case underscores the need to ask for a bill of particulars to find out the government's theory of the case.

2. "Knowingly" and "wilfully" seem to be used interchangeably in these cases. *See* United States v. Rabb, 394 F.2d 230, 1 SSLR 3164 (CA3 1968) for a definition of wilfulness in the draft refusal context. *See also* ¶2451 *infra*, arguing for a broader definition of wilfulness.

3. The prima facie validity of the induction order is often held proved by use of the "presumption of regularity" for official acts. *Compare* Lowe v. United States, 389 F.2d 51, 1 SSLR 3007 (CA5 1968), *with* United States v. Lybrand, 279 F. Supp. 74, 1 SSLR 3002 (E.D. N.Y. 1968), taking opposite positions on the presumption of regularity. *Lowe* upholds the presumption, *Lybrand* casts it aside in favor of making the prosecution prove that the defendant was called in the proper order. *See* note 7 *infra* for a full treatment of the presumption.

4. Chernekoff v. United States, 219 F.2d 721 (CA9 1955). The Army regulations require that there be an opportunity for the registrant to step forward. AR 601-270 ¶37, reprinted in SSLR at 2243. Thus, *Chernekoff* may be seen as holding that the Army must follow the regulations lest the induction process be aborted. Briggs v. United States, -- F.2d --, 1 SSLR 3144 (CA9 1968), expressly takes this view. *But see* Edwards v. United States, 395 F.2d 453 1 SSLR 3100 (CA9 1968) (minor departure from AR 601-270 does not invalidate process).

5. United States v. Rabb, *supra* note 2, is a cogently-reasoned case. There does not appear to be a reported case on intent in a refusal to submit to induction case; *Rabb* and related cases deal with refusal to report. There is some indication in Beierle v. United States, -- F.2d --, 1 SSLR 3157 (CA9 1968), that the defendant's decision to refuse induction was a capricious step, but the court did not comment upon the element of criminal intent.

6. Holding that "advice of counsel" is a defense on the issue of intent in a prosecution under 26 U.S.C. § 7201: United States v. Pechenik, 236 F.2d 844 (CA3 1956); Jett v. United States, 352 F.2d 179 (CA6 1965), *cert. denied*, 383 U.S. 935 (1966); Wardlaw v. United States, 203 F.2d 884 (CA5 1953) (counsel's advice may be relied on even it if later turns out to have been wrong).

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service file to indicate the way in which the order was issued.[7] This presumption of regularity did not dispense with the validity of the order as an element of the offense; it was merely a procedural device to enable the prosecution to get the jury without detailed proof of the legality of the local board's action. Today, the presumption is under attack, as are many presumptions which permit the prosecution to dispense with proof of essential elements of the offense charged. In *United States v. Lybrand*,[8] the court held that the government must prove that the defendant was called to service in proper order, at least in a prosecution for refusal to report for civilian work. It did so based upon an analysis of the presumption of regularity in light of the Model Penal Code tests for determining what the government should be required to prove as an element of any given offense.

The Model Penal Code definition, set out in the footnote,[9] gives rise to many interesting possibilities for contending that particular regulatory prerequisites to an induction order's validity are elements of the offense, at least when the defense raises them and insists that the government be put to its proof. This latter requirement is important, for it may underpin the rule in *Lybrand*. There the defense had from the opening of the trial insisted upon proper order of call as an element of the offense. This "putting on notice" was not exactly in the manner used by the court, the notice dispelled the presumption and required the government to come up with evidence.[10]

7. Lowe v. United States, 389 F.2d 51 (CA5 1968), deals with the presumption of regularity. Greer v. United States, 378 F.2d 931 (CA5 1967) is to the same effect, holding that at least "in the absence of any evidence to the contrary" the presumption of regularity was sufficient to sustain the government on the issue of the validity of the induction order. In Wells v. United States, 158 F.2d 932 (CA5 1946), *cert. denied*, 330 U.S. 827 (1947), the court held that the defendant has the burden of pleading and proving that the induction order or the proceedings leading to it were invalid. Though *Greer* and *Wells* were decided by the same court, it is obvious that they state two very different standards. *Wells* leaves the burden of going forward *and* the risk of non-persuasion on the defendant as to the validity of the order. *Greer* recognizes that there is a "presumption of regularity" which operates in the absence of evidence to the contrary. It is therefore consistent with *Greer* to argue that when the defendant calls into question the legality of the local board's proceedings, by means of some scrap of affirmative evidence, the presumption is dispelled, and the burden of going forward shifts to the government which must then establish beyond a reasonable doubt that the board's order was legal in the respect challenged by the defense. This reading makes *Greer* virtually indistinguishable from *Lybrand*, discussed in note 3 *supra* and note 8 *infra*. *See also* Owens v. United States, -- F.2d --, 1 SSLR 3130 (CA10 1968) (government did prove registrant called in proper order). On presumptions, inferences, and the shifting of burdens of going forward and the risk of nonpersuasion, *see generally* Comment, *The California Evidence Code: Presumptions*, 53 Calif. L. Rev. 1439 (1965), which, while it deals with the California Evidence Code provisions, contains an excellent discussion of the theory of evidentiary presumptions generally. The analysis made above is supported by Keene v. United States, 266 F.2d 378, 380 (CA10 1959), which holds that the government must prove as an element of the offense that the defendant was validly classified I-A but then permits the government to rely upon the presumption of regularity to meet its burden of proof. *Keene* analyzes the "presumption" in terms commonly used in discussing evidentiary presumptions, and notes that it may be dispelled by evidence to the contrary. *See also* United States v. Proctor & Gamble Co., 174 F. Supp. 233, 237 (D. N.J. 1959): "This presumption of regularity . . . is effective, like other presumptions of fact, only in the absence of evidence to the contrary."

8. 279 F. Supp. 74, 1 SSLR 3002 (E.D. N.Y. 1967). In *Lybrand*, the Court's analysis begins with the assertion that neither side introduced evidence on the issue of order of call, and that therefore it was necessary to determine who had the burden of proof. Of course, the defense had said, prior to trial, that it would insist that the government prove that the defendant was called in the proper order, and had reiterated this insistence in a motion for judgment of acquittal. (The defense did not put on any evidence.) The court first quoted the American Law Institute (ALI) Model Penal Code, § 1.12(1), on burdens of proof and elements of the offense, and reasoned that by ALI standards improper order of call could not be termed an affirmative defense: The government is in possession of the relevant facts, the issue is fairly easy for the government to resolve, if it can, in its favor, and the statute does not make it a matter of defense. Turning to the "presumption of regularity," the court said: "There is grave doubt about the propriety and the constitutionality of presuming an essential element of a serious crime." The court cited Morissette v. United States, 342 U.S. 246 (1952) and United States v. Tot, 319 U.S. 463, 469-70 (1943), in support of its assertion;

9. § 1.12(1) (proposed Official Draft 1962):

" 'element of an offense' means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as:

(a) is included in the description of the forbidden conduct in the definition of the offense;

(b) establishes the required kind of culpability;

(c) negatives an excuse or justification for such conduct;

(d) negatives a defense under the statute of limitations;

(e) established jurisdiction or venue."

The sole exception to the rule requiring the prosecution to prove each element of the offense beyond a reasonable doubt is as to matters of excuse or justification "peculiarly within the knowledge of the defendant." ALI Model Penal Code § 1.12(3).

10. *See* note 8 *supra*.

¶ 2405. Venue

Venue is laid in the state and district in which the defendant refuses to submit to induction, and not in the district where his local board may be located or where he lives.[1] Proper venue is an essential element of the offense, and must be proven by the government.[2]

1. United States v. Anderson, 328 U.S. 699 (1946).

2. ALI Model Penal Code § 1.12(1)(e); United States v. Gillette, 189 F.2d 449 (CA2), *cert. denied*, 342 U.S. 827 (1951). If the venue appears as an allegation of the indictment, and the defense wishes to challenge it as improper, a motion to that effect must be made in a timely manner. United States v. Jones, 162 F.2d 72 (CA2 1947). If the venue of the alleged offense does not appear on the face of the indictment, it may be sought in a bill of particulars. But the defnedant does not waive proper venue if he had no opportunity, until the prosecution's evidence is in, of knowing the basis upon which the prosecution's venue choice was made. *See generally* United States v. Gross, 276 F.2d 816 (CA2), *cert. denied*, 363 U.S. 831 (1960).

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¶ 2406. Aspects of the Negotiation Process

In a refusal to submit case, the negotiation process almost always gives an opportunity for the registrant to recant prior to trial and go into the armed forces as a way of staving off or securing dismissal of his prosecution. If a conscientious objector claim is in the case, the United States Attorney may well agree to permit the case to lie dormant while the registrant seeks reopening of his classification from the local board, using the implied approval of the United States Attorney and the help, if possible, of the State and National Director. If CO status is awarded, then the registrant's embarking upon civilian alternative service may secure dismissal of the case. See ¶¶ 2104, 2111 *supra.*

¶ 2407. Defenses--Generally

Defenses to a charge of refusal to submit to induction typically fall into one of three categories--no basis in fact for the classification, erroneous standard of law applied in determining the classification, and procedural error in classifying and processing the registrant. See ¶ 2253 *supra.*[1] The discussion below focusses upon the procedural means of raising these defenses. (In addition, the general defenses noted at ¶¶ 2301-78 may be raised.) The substantive and procedural law of classification is set out in Part II of this *Manual.*

1. A fourth ground is perhaps the substantive unconstitutionality of the classification standard, and the other defenses mentioned in ¶¶ 2301-78 *supra* should also be considered.

¶ 2408. Defenses--No Basis in Fact

The evolution of the basis in fact standard is instructive. In *Estep v. United States,*[1] the court stated the standard, holding that judicial review based on board action allegedly contrary to the weight of the evidence could be obtained only when there was no basis in fact for the board's action. This standard was further refined in *Dickinson v. United States,*[2] in which the Court insisted upon some rational basis in the evidence in the registrant's file in order to sustain the board's classification decision. The board was required in order to deny a classification request supported by evidence of the registrants entitlement to the classification he sought, to find and record "some affirmative evidence that a registrant has not painted a complete or accurate picture of his activities."[3]

In *Witmer v. United States,*[4] a conscientious objection case, the Court suggested that when the test is whether the registrant is sincere (as in a CO case) and not whether he meets certian objective requirements (as in a ministerial exemption case like *Dickinson*) then the board's disbelief in the registrant's sincerity would suffice to support denial of the claim, provided the board found and recorded some evidence to support that disbelief.

In *United States v. Seeger,*[5] the Court spoke further to the question of sincerity, and perhaps made it more, rather than less, difficult for courts to sustain denial of a classification request based upon a registrant's claim that he sincerely believes something:

> "In such an intensely personal area, of course, the claim of the registrant that his belief is part of a religious faith must be given great weight."[6]

Thus, the task of the court is to search, with the aid of the defense, through the defendant's selective service file to determine whether or not there is a basis in fact for the board's action in not giving the defendant a lower classification than I-A.[7]

The substantive discussion of the various classifications appears in Part II and it should be recalled that every decided case there cited rests upon an examination of the board's view of the evidence in light of the "basis in fact" standard.[8]

In examining the file at the time of trial, counsel should insist that the System cannot rely upon some basis in fact not reflected in the file itself.[9] Not only do the regulations require the board to find and record evidence used as a basis for classification,[10] but the *Dickinson* case stands for the same proposition.

1. 327 U.S. 114 (1946).
2. 346 U.S. 389 (1953).
3. 346 U.S. at 396.
4. 348 U.S. 375 (1955). *Witmer* and *Dickinson* are reconciled in United States v. Washington, 392 F.2d 37, 1 SSLR 3008 (CA6 1968).
5. 380 U.S. 163 (1965).
6. 380 U.S. at 184.
7. *See* United States v. Washington, *supra* note 4.
8. The discussion of the judicially-fashioned rules on "basis in fact" for the various classifications appears in Part II of the *Manual* arranged according to the classification symbols, ¶¶ 1032-71 *supra.*
9. Cox v. United States, 332 U.S. 442 (1948), states the rule. *See* ¶ 2257 *supra* for a discussion.
10. R1623.1(b). *See* Shattuck, Record-Keeping Obligations of Local Boards, 1 SSLR 4015 (1968).

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¶ 2409. Defenses – Error of Law

When a local board or appeal board applies an erroneous standard of law, or when the file contains evidence that an erroneous standard of law was applied and there is no evidence that the board disaffirmed or affirmatively decided not to use the erroneous standard, the resulting classification decision is invalid. The leading case standing for this proposition is *Sicurella v. United States*,[1] in which the erroneous standard had been applied by the Justice Department in evaluating a claim for conscientious objection under the pre-1967 procedure for processing such claims. The Supreme Court held that absent some evidence in the file that the appeal board, to whom the Department's recommendation was advisory, ignored the standard propounded by the Department, the refusal of the board to classify the registrant I-O was error. Later cases have followed *Sicurella* and broadened the basis for a finding that the board may have applied an erroneous standard.[2] Absent a finding that the error was nonprejudicial, an "erroneous legal standard" case is far less complex than a "basis in fact" case. The evidence of an erroneous standard may be found in memoranda in the file,[3] or perhaps even proven by testimony concerning what the board members said and did during a personal appearance, if the evidence would show that they were misapplying the law. See ¶ 2258 *supra*.

1. 348 U.S. 385 (1955).
2. United States v. Carroll, -- F.2d --, 1 SSLR 3168 (CA3 1968). United States *ex rel.* Wilkerson v. Commanding Officer, 286 F. Supp. 290, 1 SSLR 3148 (S.D. N.Y. 1968) is in part an erroneous standard case: The board misinterpreted the Army dependency regulations in denying reopening of a registrant's classification to consider his claim that his parents had become dependent upon him.
3. As in *Wilkerson, supra* note 2, and *Sicurella, supra* note 1.

¶ 2410. Defenses—Procedural Error

The failure to send requested forms,[1] failure to provide accurate information concerning procedural rights,[2] failure to give a personal appearance (or making the appearance a sham),[3] failure to reopen a classification when required to do so either by regulation or by virtue of judicial limits upon the power to refuse reopening[4]–these and other procedural failures may justify a court in overturning the board's decision, It is generally held that the failure of the system to follow the procedural standards laid down in the selective service regulations is error, and the term "denial of due process" is often used to describe departures which deny important procedural rights.[5] This salutary recognition of the importance of the System following its own rules is qualified by the de novo review doctrine[6] and the harmless error rule.[7]

The de novo review doctrine holds that the classification actions of the appeal board and the National Selective Service Board is *de novo* and not by way of review on appeal, so that consideration by these bodies cures local board error and consideration by the National Board cures appeal board error. The justification for this doctrine is not clear, but it will be met time and again in the form of contentions by the government. One difficulty is that the de novo doctrine undercuts the legislative preference for the local board as the key unit in the Selective Service System. A well-recognized exception to the de novo review doctrine is summed up in the statement that the registrant is entitled to a fair hearing at *each stage* of the classification process, and that denial of a meaningful personal appearance (or of any personal appearance at all) or prejudicial misconduct by the local board members, cannot be cured by the appeal board's de novo considerations.[8]

The second obstacle to acquittal based upon a procedural error is the harmless error rule. One might argue that violation of any important procedural regulation should invalidate board action, by analogy to criminal cases construing mandatory rules of criminal procedure[9] and administrative law cases dealing with the obligation of agencies to follow their own rules.[10] Indeed, many selective service cases speak in terms

1. Boswell v. United States, 390 F.2d 181, 1 SSLR 3057 (CA9 1968).
2. *E.g.*, Striker v. Resor, 283 F. Supp. 293, 1 SSLR 3019 (D. N.J. 1968). *See* ¶¶ 45, 48 *supra*.
3. *See* ¶ 1079 *supra*.
4. *See* ¶ 1096 *supra*.
5. *E.g.*, United States v. Walsh, 279 F. Supp. 115, 121, 1 SSLR 3010, 3012 (D. Conn. 1968) (board's action was violation of regulations "and therefore of procedural due process").
6. An extreme statement of the de novo review doctrine is found in Clay v. United States, -- F.2d --, 1 SSLR 3088 (CA5 1968).
7. Knox v. United States, 200 F.2d 398 (CA9 1952); Wills v. United States, 384 F.2d 943 (CA9 1967), *cert. denied*, -- U.S. -- (1968); United States v. Freeman, 388 F.2d 246, 1 SSLR 3012 (CA7 1968).
8. United States v. Peebles, 220 F.2d 114 (CA7 1955); Niznik v. United States, 173 F.2d 328 (CA6), *cert. denied* 337 U.S. 925 (1949). Shattuck, *Record-Keeping Obligations of Local Boards*, 1 SSLR 4015, 4025 (1968). *See* ¶ 1079 *supra*.
9. Ingram v. United States, 272 F.2d 567 (CA4 1959) (violation of mandatory severance provisions of F.R.Crim.P. 8 requires reversal; defendant prejudiced by the "very fact" of misjoinder).
10. Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957).

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which suggest a due process obligation to follow basic selective service procedural regulations in dealing with registrant.[11] However, some leading cases qualify this assertion. For example, *Knox v. United States,* a Ninth Circuit case, qualifies its statement that failure to follow the rules is error which vitiates the board's decision with a dictum relating to the requirement of prejudice.[12] The Seventh Circuit, in *United States v. Freeman,*[13] addressed itself squarely to the problem, relying on the First Circuit to hold that the government must prove beyond a reasonable doubt that a registrant was not prejudiced by denial of his right to appeal when the local board denied reopening. Perhaps the better rule could be stated thus: Failure to follow rules relating to procedure is a denial of due process, whether the system was constitutionally required to make such rules in the first place;[14] once a denial of a constitutional right is shown, the government must prove beyond a reasonable doubt that denial did not prejudice the registrant.[15]

11. *E.g.,* United States v. Walsh, note 5 *supra.*
12. 200 F.2d 389, 401 (CA9 1952).
13. 388 F.2d 246, 1 SSLR 3012 (CA7 1967).
14. *See* Service v. Dulles, 354 U.S. 363 (1957); Vitarelli v. Seaton, 359 U.S. 535 (1959).
15. In a criminal case, state or federal, when a constitutional violation is shown to have been committed by the authorities, the defendant's conviction must be set aside unless the government can prove beyond a reasonable doubt that the error did not prejudice the defendant. Chapman v. California, 386 U.S. 18 (1967).

¶ 2411. Special Problems—Judicial Review Foreclosed—Failure to Exhuast Remedies Within the System

As a general rule, a registrant must take administrative appeals from adverse local board action. If he does not do so, he may be held to have waived his right to judicial review of alleged error in the classification process.[1] The registrant's obligation in this regard is apparently (although not indisputably) limited to taking an appeal to the appeal board when one is available to him, and perhaps to the National Board when he has a right to such an appeal.[2] He need not, apparently, seek to exhaust remedies which are not available as of right, but are merely within the discretion of the System to give him; an example of such remedies is an appeal to the National Board when there is not dissenting vote on the appeal board. See ¶ 1090-94 *supra.* No case has been found dealing with failure to exercise the right to a personal appearance, but since exercise of the right would often involve the registrant's travelling a great distance, requiring the registrant to "exhaust" his personal appearance remedy would be unreasonable.[3]

There are exceptions to the exhaustion of remedies rule.[4] If the local board's error is based upon a clear mistake of law, and particularly if the error is of constitutional magnitude, the need to take an administrative appeal is attenuated. Courts are not wont to give the Selective Service System deference on such issues. As the court said in *Wills v. United States,*[5] in refusing to foreclose the registrant's right to judicial review of a classification decision involving a claim that there was a first amendment right not to carry one's draft card:

> "[A] ppellant's objection to his classification was not addressed to the area of administrative judgment. It did not pose a question upon which courts, bowing to special expertise, would regard the administrative determination as final, save only where basis in fact is lacking. His objection, founded upon a claim of constitutional right, was one on which courts have little reason to defer to administrative determination."[6]

1. Cases are legion. Recent decisions include United States v. Dyer, 390 F.2d 611, 1 SSLR 3100 (CA4 1968); Edwards v. United States, 395 F.2d 453, 1 SSLR 3100 (CA9 1968); DuVernay v. United States, 394 F.2d 979, 1 SSLR 3170 (CA5 1968); Thompson v. United States, 380 F.2d 86 (CA10 1967).
2. *Edwards, supra* note 1, and *Dyer, supra* note 1, both speak expressly of the registrant's obligation to appeal as provided in R1626.2, which deals only with an appeal to the appeal board, and not with personal appearance or with appeal to the National Board. This gives support to the contention that a registrant is not required to attempt to appeal to the National Board, except when he has such an appeal as a matter of right as a consequence of a divided vote on the appeal board. *See* Part 1627 of the regulations. ¶¶ 1090-94 *supra* discuss appeals to the National Board.
3. *But cf.* DuVernay v. United States, 394 F'2d 979, 980-81, 1 SSLR 3170 (CA5 1968) (personal appearance is a step in the appellate process) (dictum).
4. Indeed, the Ninth Circuit, for example, states the rule as follows: "[A] registrant may not challenge his classification in the courts where, *absent exceptional circumstances,* he has failed to exhaust his administrative remedies by appealing from the local board's classification." *Edwards, supra* note 1, 395 F.2d at 454, 1 SSLR at 3101 (emphasis supplied).
5. 384 F.2d 943 (CA9 1967). *Wills* was followed in an able opinion by Judge Jones in United States v. Carson, 282 F. Supp. 261, 1 SSLR 3046 (E.D. Ark. 1968). Other cases include DuVernay v. United States, 394 F.2d 979, 1 SSLR 3170 (CA5 1968), holding that even a claimed denial of due process by the local board will not excuse a failure to exhaust administrative remedies, but recognizing that other extenuating circumstances might be an excuse (citing Donato v. United States, 302 F.2d 468 (CA9 1962), and that perhaps failure to understand the nature and necessity of an appeal would also excuse failure to appeal. 394 F.2d at 980. *See also* Evans v. United States, 252 F.2d 509 (CA9 1958); United States v. Garth, 239 F. Supp. 164 (M.D. Ala. 1964), and cases cited in *Du Vernay*, 394 F.2d at 981. *Du Vernay* is to be read cautiously, however, for it foolishly and completely confuses the problem of ripeness (going to the brink of the induction process) with that of exhaustion of remedies by taking administrative appeals. *See*, for apt description of the difference between the two, Griffiths, *Some Notes on the Solicitor General's Memorandum in Oestereich*, 1 SSLR 4012, 4014 (1968).
6. 384 F.2d at 945.

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An additional factor militating against application of the exhaustion rule is the futility of an appeal. If it is clear that a registrant's claim is one of a class of such claims foreclosed by System regulatory decision or by the consistent course of System practice, then failure to take an appeal might be excused.[7] Moreover, in *Lockhard v. United States*,[8] the Ninth Circuit held that where the evidence was uncontradicted that the registrant did not understand what an "appeal" was and did not know the consequences, in terms of denial of judicial review, of failing to take an administrative appeal, the exhaustion rule would not be used to preclude the court reaching and deciding the issue whether the board had a basis in fact for denial of the I-O classification which the registrant had sought. This case obviously has broad implications given most registrants' comparative ignorance of the System's procedural machinery.

It should be emphasized that arguments which might be raised in court to militate against forclosure of judicial reviews through failure to take administrative appeals are not to be considered as justification for a practitioner's counselling a client who is in the administrative process against taking all appeals to which he has a right.

7. In Wolff v. Selective Service Local Board No. 16, 372 F.2d 817, 825 (CA2 1967), the court held that the plaintiff-registrants were excused from taking an administrative appeal from a punitive reclassification from II-S to I-A as it was clear that it would be futile to do so in light of the widely-publicized views of the Director of Selective Service approving of such reclassifications. In Glover v. United States, 286 F.2d 84 (CA8 1961), the registrant was held not required to appeal from his fifth classification as I-A, when he had appealed unsuccessfully from a previous reclassification and where the local board did not inform him of the basis for reclassifying him.

8. -- F.2d --, 1 SSLR (October 1968).

¶ 2412. Special Problems—What Is A Jury Issue?

Despite the limiting language in the cases, issues of basis in fact and procedural error may be jury issues if skillfully presented. This question is mentioned here for the sake of completeness and is discussed in detail at ¶ 2754 *supra*. Moreover, as pointed out in ¶ 2407 *supra*, although the validity of a classification is generally held to be a question for the court and not for the jury, this body of law is by no means unamenable to challenge.

¶ 2413. Special Problems—Going Outside the File

Generally, neither the government nor the defense may go outside the file to prove basis in fact (or lack of it) or mistake of law.[1] Generally, both may go outside the file in proving or disproving procedural irregularity.[2] These rules are subject to exceptions of varying importance.

In proof of "no basis in fact" or "error of law," the courts are fairly stringent in prohibiting proof outside the record. Exceptions would include attempts to make a "no basis in fact" case using a procedural irregularity approach, as by showing that a damaging document was improperly placed in the file, or that some material submitted by the defendant was not placed in the file as required by the regulations.

In *United States v. Gearey*,[3] the Court of Appeals for the Second Circuit appears to have countenanced an extensive excursion outside the file, in the determination of whether the registrant's conscientious objector claim was denied by the board based upon the view that it could not be entertained after issuance of an order to report for induction, or upon the theory that the registrant's claim had matured prior to issuance of the order. The court of appeals permitted taking of testimony of board officials on this question.[4] This decision appears clearly wrong, for it applied the "procedural irregularity" rule when the issue was "error of

1. Cox v. United States, 332 U.S. 442, 453-54 (1948); United States v. Wider, 119 F. Supp. 676, 681 (E.D. N.Y. 1954); Sicurella v. United States, 348 U.S. 385 (1955).

2. As was done in, *e.g.*, Niznik v. United States, 173 F.2d 328 (CA6), *cert. denied*, 337 U.S. 925 (1949). The need for going outside the file is established when the challenge being made rests upon material which would not logically be included in the file or which the registrant was denied permission to put there. The registrant may also be permitted to "clarify" material he submitted to the board. An important decision in this regard is Petersen v. Clark, 1 SSLR 3132 (N.D. Calif. 1968) (decision in civil case). *See also* Brown v. United States, 396 F.2d 989 (Ct. Cl. 1968).

3. 368 F.2d 144 (CA2 1966). For the subsequent procedural history, *see* note 4 *infra*.

4. On remand, the district court took testimony and affirmed its prior decision finding the defendant guilty. 266 F. Supp. 161 (S.D. N.Y. 1967), *aff'd*, 379 F.2d 915 (CA2), *cert. denied*, 389 U.S. 959 (1967).

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law." In *Sicurella v. United States,*[5] the Supreme Court overturned the conviction of a Jehovah's Witness because the Department of Justice recommendation to the appeal board was based upon a mistaken legal premise, and because it did not affirmatively appear in the registrant's file that the appeal board had rejected this premise in deciding the case. This result finds support in other cases.[6] It appears wisest to insist that the board record the basis for its decision and that it not be permitted to fill in its justification with self-serving statements made much after the fact while the matter is in litigation. The board should be required to spell out its reason for denying a claim on pain of having the court infer that its reason was improper. Such a rule permits the registrant contemporaneous opportunity to meet and deal with board objections to his position, and promotes resolution of disputes within the System rather than in the courts.

When a procedural irregularity is urged as a defense, it is often necessary to call board members to ascertain what happened. Here, too, however, it should be insisted that if the government is to contend that a given procedural right was given or a procedural step taken, that the file reflect that occurrence, at least where the file itself or other selective service forms provide an opportunity (and indeed a requirement) that notations of these things be made. There is also some case law indicating that a registrant may not go outside the record he made in the selective service system in claiming that he was denied a procedural right, at least when the regulations require him to request the right in a writing which is to be made part of his selective service file.[7] These cases are to be distinguished from those which hold that a registrant will be precluded from making a claim he did not first make in the Selective Service process. See ¶ 2411 *supra.* They are also to be distinguished from an attempt to claim procedural unfairness by evidence that he could not properly have presented to the selective service system at any point, or should not as a matter of policy have been expected to present.[8]

5. 348 U.S. 385 (1955).

6. *See, e.g.,* United States v. Hagaman, 213 F.2d 86 (CA3 1954), discussed at ¶ 1087 *supra. Cf. In re* Crane, 284 F. Supp. 250, 1 SSLR 3051 (N.D. Calif. 1968).

7. *See, e.g.,* Hoapili v. United States, 395 F.2d 656, 1 SSLR 3099 (CA9 1968), which holds that failure to make a written request for a Form 150 (to claim conscientious objector status) precludes a registrant from claiming that the form was not given to him as required by the regulations. The court construed the regulations to require a written request for the form. *Hoapili* and related cases thus stand for the proposition that a registrant may not assign as error the denial of a procedural right which he does not request in the manner provided in the regulations. However, such requests must be construed liberally in favor of granting the procedural right sought. Talcott v. Reed, 217 F.2d 360 (CA9 1954); United States v. Abajian, 1 SSLR 3039 (C.D. Calif. 1968).

8. *See* the quotation from the *Niznik* case at ¶ 2258 n. 1, excusing a registrant's failure to insist that material rejected by the local board be included in his file for transmission to the appeal board.

¶ 2414. Sentencing

Sentencing a refuser of induction is a difficult matter, and the many policy choices open provide a chance for counsel to do creative persuasive work. If his conscientious objector claim was denied by the System, the judge may be favorably enough impressed with the defendant that while he can find there is no basis in fact for denial of I-O, that the defendant should be placed on probation on condition he do some work which fulfills the requirements of Section 6(j) of the Act[1] and R1660.2. Above all it should be borne in mind that conviction validates the induction order if the validity of the order was in issue and the defendant maybe required to report again. See ¶ 8.1 *supra.* Therefore, some restriction on his freedom of movement should perhaps be sought or suggested to make him disqualified for induction under AR 601-270, paragraph 13, which makes those in custody administratively unacceptable.

And most important, the possibility of using the Youth Corrections Act should be explored. See ¶ 2270-73 *supra.*

1. *See* United States v. Margolies, 1 SSLR 3125 (D. D.C. 1968). Sentences recently awarded are reported in News Notes, a publication of the Central Committee for Conscientious Objectors, listed in the *Bibliography*. Current trends in sentencing are reported in the SSLR *Newsletter*. A memorandum concerning sentencing setting out recent decisions in the field may be helpful in convincing the judge. (The *Margolies* memorandum, filed by defense counsel, is available in facsimile from SSLR for $1.00.) There are very few reported cases on sentencing, but SSLR attempts to find and report from stenographic transcript the significant oral rulings in the field. The current SSLR *Index* should be consulted. In suggesting appropriate civilian work assignments, the NSBRO (address in SSLR's *Bibliography*) "Civilian Work Agency List" may be consulted.

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¶ 2426. Refusal to Report for or Remain in Civilian Work--Generally

The offense of refusing to report for civilian work is considered together with that of leaving one's assigned work without authorization, as the two prosecutions raise the same issues.[1] The following discussion applies only to a registrant who has been classified I-O and ordered by his local board to do the alternative service specified in § 6(j) of the Act.

1. It is the practice in many jurisdictions to allege that the defendant failed to "report for and remain in" civilian work, apparently following a form approved by the Justice Department. Such pleading is hardly to be commended, *see* ¶ 2202 *supra*, and the defendant is certainly entitled to a bill of particulars specifying just what he is charged with. *See* ¶ 2203 *supra*.

¶ 2427. Elements of the Offense

The elements of the offense are:

1. Mens rea, or intent.[1]

2. Failure to report to the local board for instructions on proceeding to the assigned place of employment,[2] *or* having reported, failing to report to the employer designated by the board in the Order to Report, SSS Form 153,[3] *or*, having reported to the employer, refusing or failing to remain at work under the employer's direction for twenty-four months unless sooner released or transferred.[4]

3. Doing the foregoing in disobedience of a valid order to report.[5]

The discussion at ¶¶ 2407-10 *supra* is applicable here concerning procedural defenses, although it should be noted that a registrant who reports for civilian work and remains at work for some time and then leaves, may be foreclosed from raising the question of the illegality of the board's order to report. This proposition may follow from the cases holding that a registrant who submits to induction and does not soon thereafter bring habeas corpus to challenge the legality of his detention in the army may be held to have waived his right not to have been inducted in the first place.[6] However, there is authority holding that a registrant does not waive his claim of error by remaining in civilian work.[7]

1. *See* Smith v. United States, 391 F.2d 544, 1 SSLR 3007 (CA8 1968). *Compare* ¶ 2404 *supra* and 2452 *infra*.

2. *See* Johnson v. United States, 285 F.2d 700 (CA9 1960); Brede v. United States, 396 F.2d 158, 1 SSLR 3098 (CA9 1968). However, a registrant need not, apparently, be ordered first to his local board before going to the place of civilian employment, at least where he does not insist upon first travelling to the board. United States v. Coon, 153 F. Supp. 96 (D. Utah 1957), *appeal dismissed*, 249 F.2d 320 (CA10 1957).

3. Johnson v. United States, *supra* note 2.

4. There do not appear to be any reported cases; however, United States v. Margolies, 1 SSLR 3125 (D. D.C. 1968), reported as a sentencing matter, involved an indictment for leaving civilian alternative service after reporting and performing the service for several months. Prior to the organization of the civilian work program, and particularly during World War II when conscientious objectors were assigned to civilian public service camps, there were many prosecutions for leaving the camps after having reported for duty. *See* Cox v. United States, 332 U.S. 442 (1948) (AWOL from civilian public service camp); Wolfe v. United States, 149 F.2d 391 (CA6 1945). *Cf.* United States v. Chiarito, 69 F. Supp. 317 (D. Ore. 1946), a prosecution for failing to report to a second camp after being given orders at the first to go there.

5. *See* United States v. Lybrand, 279 F. Supp. 74, 1 SSLR 3002 (E.D. N.Y. 1967); ¶ 2404 *supra*.

6. Pickens v. Cox, 282 F.2d 784 (CA10 1960). In *Pickens*, an enlisted man in the armed forces sought habeas corpus after having been court-martialed for an in-service offense. His principal contention was that, as a sole surviving son, he should never have been inducted in the first place. The court held that his claim came too late, and that he had waived it by entering the armed forces and performing military duties.

7. Poole v. United States, 159 F.2d 312 (CA4 1947) held that a registrant did not waive his claim that he should have been classified as a minister by remaining in civilian service camp for two and one-half years and then leaving and subjecting himself to prosecution. In *Cox, supra* note 4, the Court considered the defendant's claims of improper classification in a prosecution for being AWOL from a civilian public service camp.

¶ 2428. Venue

Venue will depend upon the precise character of the offense. If the registrant does not report to the local board as ordered, he will be charged in the judicial district in which his local board is located.[1] If he

1. Pitt v. United States, 378 F.2d 608 (CA8 1967); the same result is suggested by the leading case of United States v. Johnston, 351 U.S. 215 (1956), in which the court held that venue in a prosecution for refusing to report to a place of civilian employ should be laid in the district in which the work was located. The court said that the order to report to the board to receive instructions on proceeding to a place of civilian work set out two duties (implying that failure to perform either duty was a punishable offense), the duty to report to the board and the duty to proceed from thence to the place of civilian employ. The registrants in *Johnston* had reported to the local board. Therefore, they were guilty, if at all, only of refusing to proceed from the board to the place of employment, and could be prosecuted only at the latter place, even if they had never been there. In *Johnston*, the Court cited and distinguished Dodez v. United States, 329 U.S. 338 (1946).

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does report but then does not appear at the designated place of employment, he will be charged in the district in which the employment is located.[2] If he leaves his employment he will be charged in the judicial district in which the employment is located.[3] On the importance of a timely challenge to improper venue, see ¶ 2405 *supra.*[4]

2. United States v. Johnston, *supra* note 1. Three Justices dissented in *Johnston*, on the ground that Congress might provide that a registrant should be prosecuted in a judicial district where he had never been, had performed no act, and which might be at a great distance from his home, but that Congress had not unequivocally done so and should not lightly be held to have intended such a harsh result. In United States v. Chiarito, 69 F. Supp. 317 (D. Ore. 1946), the court held that a registrant could not be prosecuted in Colorado for failing to report to a civilian public service work camp located there, on the ground that the sixth amendment's requirement that an accused be tried in the state and judicial district in which the crime shall have been committed would be violated thereby. The *Chiarito* opinion is lengthy and well-reasoned, and deserves careful study as a basis for attacking the prevailing venue rule in failure to report cases.

3. *Compare* Pitt v. United States, note 1 *supra*. This result is suggested by no clear holding, but follows a fortiori from the result in *Johnston*, and is implicit in the World War II public service camp AWOL cases cited *supra* note ¶ 2427.

4. *See also* United States v. Jones, 162 F.2d 72 (CA2 1947) (when face of indictment warns of alleged improper venue, defendant waives the error by going to trial without objecting).

¶ 2429. Aspects of the Negotiation Process

On negotiations generally, see ¶¶ 2104, 2111 *supra.* Willingness of the defendant to relent and perform the civilian work is a ground to seek a negotiated dismissal. Invalidity of the CO classification is generally another, such as where there is a ministerial claim of exemption or deferment. Procedural defenses such as improper order of call may also be the subject of negotiations, but remember that the result of raising them in negotiation may be only a new order to report, issued in the proper manner.

Negotiation should center, in appropriate cases, upon the defendant's willingness to do civilian work under the direction of someone other than the Selective Service System, such as the court. If the government will agree to dismiss conditional upon the defendant doing some alternative service, perhaps that could be arranged. Usually, however, such claims must be presented to the trial judge by means of a plea of guilty or nolo contendere[1] and a request that the court order the defendant to perform civilian work as a condition of probation, but under the direction of the officers of the court rather than of the selective service system. See ¶¶ 2270-73 *supra.*

The attorney should also be aware of the provisions of LBM 64 which require review by the Director of all cases involving a conscientious objector or ministerial claim. This review provides an opportunity to negotiate with System officials.

1. On the plea of nolo contendere, *see* ¶ 2110 *supra*; United States v. Kennedy, 1 SSLR 3178 (D. D.C. 1968).

¶ 2430. Defenses––Generally

The rules as to ripeness and the availability of judicial review are slightly different than in a case of refusal to submit to induction. Reporting to the local board is a mere ministerial step in the classification process, and failure to report has been held not to preclude judicial reivew.[1]

When the availability of judicial review is settled, the potential defenses to a charge of refusal to submit to induction are also available in a refusal to report for civilian work case. See ¶ 2407 *supra.* Thus, the lack of a basis in fact for a board decision denying a classification lower than I-O may be urged as a defense,[2] or it may be urged that the government must prove that the registrant was not entitled to a classification lower than I-O.[3] (Most cases of refusal to report for civilian work involve members of the Jehovah's Witness sect,

1. Daniels v. United States, 372 F.2d 407 (CA9 1967) (when a I-O registrant receives order to report to board for assignment to civilian work, he has received a final order and selective service process is at an end); United States v. Willard, 211 F. Supp. 643 (N.D. Ohio 1962), *aff'd*, 312 F.2d 605 (CA6 1963), *cert. denied*, 372 U.S. 960 (1963) (held that failure to report to board was failure to pursue administrative process to its end, however the failure was so slight as to justify court in reviewing defendant's contentions of error in the classification process. *But see* United States v. Camp, 285 F. Supp. 400 (N.D. Ga. 1967) (§ 10(b)(3) requires registrant to report to board, then fail to report to employer, as prerequisite to judicial review).

2. *See* ¶ 2408 *supra* on the defense of "no basis in fact." The registrant would, in defending on this score, claim that the board lacked a basis in fact for denying him a classification which he sought which was lower than I-O. The list of classifications, from highest to lowest, appears at R1623.2. In Klubnikin v. United States, 227 F.2d 87 (CA9), *cert. denied*, 350 U.S. 975 (1955), the court held that the III-A deferment for hardship to dependents was available only to defer a registrant from induction in the armed forces, and not to permit deferment of a I-O registrant. The soundness of this holding is questionable in light of the specific provisions of the regulations listing the classifications from highest to lowest, R1623-.2. The Ninth Circuit was presented with the issue again in Petrie v. United States, –– F.2d ––, –– n.5, 1 SSLR 3104, 3105 n. 5 (CA9 1968), but decided the case on other grounds.

3. *See* United States v. Lybrand, 279 F. Supp. 74, 1 SSLR 3002 (E.D. N.Y. 1967), and the discussion at ¶ 2404 *supra*.

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many of whom claim the ministerial exemption. In such a case the discussion at ¶¶ 1065-68 *supra*, should be consulted.)

The registrant may also defend based upon alleged procedural error or error of law. See ¶¶ 2409-10 *supra*, dealing with these two defenses in the substantially identical procedural context of a refusal to submit case.

An important "procedural error" defense was recognized in *Brede v. United States*.[4] *Brede* dealt with board failure to follow the terms of R1660.20, which sets out in detail the manner in which the board is to determine the appropriate civilian work for the registrant to perform. The board itself and not its clerk must choose the work and sign the order, the court held, and one may argue strongly that the registrant must be given every opportunity to impress his views upon the board and upon the State Director in choosing appropriate civilian work.

4. 396 F.2d 155, 1 SSLR 3098 (CA9 1968).

¶ 2431. Defenses—Suitable Civilian Work

The statute provides for "civilian work" for conscientious objectors. § 6(j). One court has, in dictum, expressed doubts about making CO's subject to the orders of a system dominated by military personnel,[1] but whenever the issue has been squarely presented for decision, the courts have elevated form over substance and pointed to the prohibition in the Act on military personnel serving on local boards, which are after all the agencies which choose the civilian work assignment for the registrant.[2]

The regulations provide for assignment of the conscientious objector to either governmental agency, or a private nonprofit agency dealing with health, welfare, or other activity for the benefit of the general public. R1660.1 See ¶¶ 1129-30 *supra*. This latitude may be good as a matter of policy for it increases the potential choices of job for COs. However, it has been criticized on constitutional grounds by one court;In *United States v. Copeland* the court said that conscription into private employ would be unconstitutional.[3] *Copeland* has been rejected by the Ninth and Seventh Circuits.[4]

1. In United States v. Chiarito, 69 F. Supp. 317 (D. Ore. 1946), the court termed the practice of sending World War II conscientious objectors to "civilian public service camps" commanded by military officers a "perversion" of the statutory principle of alternative service under civilian direction. Chiarito was charged with disobeying an order by a military officer to proceed from a camp in Oregon (to which he has been assigned by his civilian local board) to a camp in Colorado, and the court seriously questioned the legality of a military officer countermanding the civilian order to report to the Oregon camp. The discussion was, however, not directly relevant to the case at hand, because the question was whether Chiarito could lawfully be surrendered on a Colorado federal court indictment for failing to report to the camp there.

2. *E.g.*, Mang v. United States, 339 F.2d 369 (CA9 1964). No purpose is served by listing the many decisions upholding the legality of the civilian public service camps in World War II, which were in many cases commanded by military officers, or upholding the legality of present-day civilian service. *See, e.g.*, Gibson v. United States, 329 U.S. 338 (1946).

3. 126 F. Supp. 734 (D. Conn. 1954).

4. United States v. Hoepker, 223 F.2d 921, *cert. denied*, 350 U.S. 841 (1957); Johnson v. United States, 285 F.2d 700 (CA9 1960). Many registrants have litigated the suitability of the civilian work assigned them, and in all the reported cases, they have been unsuccessful. The cases are collected under Notes 22 and 23 in the annotations to 50 U.S.C.A. App. § 456. *See also* Langhorne v. United States, 394 F.2d 129, 1 SSLR 3065 (CA9 1968); Loewing v. United States, 392 F.2d 218 (CA10 1968); United States v. Camp, 285 F. Supp. 400 (N.D. Ga. 1967).

An attack might be mounted on the constitutionality of civilian alternative service, either as a species of conscription, as in Holmes v. United States, 387 F.2d 781 (CA7 1967), *cert. denied*, 391 U.S. 936, 1 SSLR 3084 (1968) (*see especially* Douglas, J., dissenting from denial of certiorari), or in and of itself. In the latter case, an argument might be made that alternative service interferes with the free exercise of religion of those conscientiously opposed to performing it, and that imposition of alternative service as a condition of the I-O classification is a forbidden form of discrimination. However, it must be underscored that there is ample precedent rejecting these arguments, although contemporary trends in constitutional litigation make earlier cases of doubtful validity. *See* Sherbert v. Verner, 374 U.S. 398 (1963), discussed ¶ 3 *supra*.

¶¶ 2432-40. [Vacant]

¶ 2441. Special Problems—Exhaustion of Remedies in Selecting Civilian Work

An "exhaustion" problem peculiar to this class of cases should be noted. Objections to the form of civilian work the registrant is to perform will not usually be entertained by the court unless the registrant has sought to use the remedies available to him under R1660.20 to convince the local board to order him to work of his choice.[1] While this rule has never been articulated in more than general terms, it may be subject to an exception where the registrant's objection would clearly be fruitless, for example because the System's policy of approving a particular work assignment alleged by the registrant to be legally improper is clearly established.[2]

1. Langhorne v. United States, 394 F.2d 129, 1 SSLR 3065 (CA9 1968).

2. *See* ¶ 2411 *supra*.

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¶ 2442. Sentencing

The possibility of a nonincarcerative sentence for a refuser of alternative service is rather remote if statistics are to be taken as a guide. However, it is well to argue in discussing sentence that the registrant's religious convictions have been authoritatively certified as sincere by his local board. His refusal to perform the alternative service will in the majority of cases proceed from the same set of sincere convictions. In such a case it seems little is gained by an incarcerative sentence.[1] Perhaps the court would consider a nonincarcerative sentence based upon the defendant's willingness to do the same kind of work that I-O's must perform, but under the court's direction, so that the probation is not a "windfall." Such an argument has been accepted.[2]

1. The court expressly recognized that "rehabilitating" a Jehovah's Witness who refused alternative service was not a relevant consideration in sentencing, in United States v. Kennedy, 1 SSLR 3178 (D. D.C. 1967).

2. United States v. Kennedy, *supra* note 1, United States v. Margolies, 1 SSLR 3125 (D. D.C. 1968) (granting probation under Youth Corrections Act).

3. *Refusal or Failure to Report for Induction*

¶ 2451. Refusal or Failure to Report for Induction––Generally

This offense consists in not even going to the induction center. It thus presents special problems of "exhaustion of remedies," or, more accurately, of ripeness.[1] The problem of "ripeness" is also referred to as that of "going to the end of the line" or "going to the brink."

1. *See* Griffiths, *Some Notes on the Solicitor General's Memorandum in Oestereich*, 1 SSLR 4012, 4014 (1968).

¶ 2452. Elements of the Offense

The elements of the offense are:

1. Intentional, knowing, wilful conduct by the defendant.[1]
2. Failure to report as ordered.[2]
3. A valid order to report.[3]

The element of intent is important and if a defendant is merely late by a few hours, his having shown up may negate the required mens rea.[4] It may be shown in defense that the defendant justifiably did not know he was supposed to report.[5]

The failure to report as ordered means a substantial failure and not a technical one of being a little late.[6] However, "reporting" means reporting in readiness to go through the induction center procedures.[7]

Beyond these two statements it is difficult to go. The rule concerning "exhaustion of remedies" or ripeness, discussed below, generally precludes raising defects in the classification process. If, however, as argued below, judicial review of the classification or processing of a registrant should be permitted in a refusal to report case, the discussion at ¶¶ 2407-10 *supra* becomes relevant.

1. United States v. Rabb, 394 F.2d 230, 1 SSLR 3164 (CA3 1968) (defining wilfully and giving approved jury instruction); United States v. Hoffman, 137 F.2d 416 (CA2 1943) (something more is required than mere failure to report on time and therefore defendant's intent in being late for induction is important); Silverman c. United States, 220 F.2d 36 (CA8 1955) (semble); *cf.* United States v. Prue, 240 F. Supp. 390 (D. Neb. 1965) (intent to report sometime in future not a defense). *But see* Moorman v. United States, ¶ 2477 n. 1 *infra*.

2. Includes duty to report substantially on time. United States v. Prue, *supra* note 1.

3. While the discussion in ¶ 2454 *infra* indicates that many defenses are foreclosed because a defendant who does not report has been held not to have pursued his administrative remedies to the end, there may be some board errors which are so egregious that a registrant need not even report for induction. The discussion below treats the extent to which an invalid order may be made the subject of judicial challenge.

4. United States v. Hoffman, *supra* note 1.

5. United States v. Rabb, *supra* note 1.

6. United States v. Hoffman, *supra* note 1.

7. Smith v. United States, 148 F.2d 288 (CA4 1945), *rev'd on other grounds*, 327 U.S. 114 (1946); United States v. Collura, 139 F.2d 345 (CA2 1943).

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¶ 2453. Venue

Venue lies where the registrant should have reported. The place of reporting is set out in the order to report for induction.[1] The advisability,[2] and indeed the constitutionality,[3] of resting a venue choice upon so tenuous a contract with the chosen forum ought to be open to question; however, the matter appears to have been settled by decisions of the Supreme Court upholding closely analogous venue choices,[4] and the registrant must seek a remedy by filing a motion to transfer under Rule 21(b).

1. United States v. Van Den Berg, 139 F.2d 654 (CA7 1944). The order specifies that the registrant shall report to a designated place, usually his local board, for transportation to the Armed Forces Examining and Entrance Station (AFEES). Since the government transports him to the AFEES, and since the order specifically states that he must report to a particular spot, his "duty" would seem to arise at the place to which he must first report rather than at the AFEES. (This would not be so as to a refusal to report which is in reality a refusal to perform part of the preinduction ritual. *See* ¶ 2452 n. 7.) This interpretation is supported by Johnston v. United States, 351 U.S. 215 (1956), and the express reference in that case to the significance of the government's transportation of registrants beyond the place at which they were originally ordered to report. *See* ¶ *supra.*

2. *See* the dissent in *Johnston*, 351 U.S. at 223, arguing that for strong reasons of policy, a registrant should not be forced to stand trial at a place distant from home, friends, and family because of a venue choice resting upon considerations of technical rather than substantial justice. *See* ¶ 2211 *supra.*

3. *See* United States v. Chiarito, 69 F. Supp. 317 (D. Ore. 1946).

4. Johnston v. United States, *supra* note 1; Travis v. United States, 364 U.S. 631 (1961) (discussed at ¶ 2211 *supra*).

¶ 2454. The Central Problem of "Exhaustion of Remedies"

Since *Falbo v. United States*,[1] and its reinterpretation in *Estep v. United States*,[2] the general rule has been that in order to obtain judicial review of his claim of board illegality, a registrant must take all the steps in the induction process up to, but not including, the symbolic step forward signifying entry into the armed forces. By doing that, he would have given the Selective Service System and the Department of Defense every possible opportunity to rule him ineligible for service and thereby make resort to the courts unnecessary. This doctrine. usually called "exhaustion of remedies," may perhaps more aptly be termed one of "ripeness for review," to distinguish it from the exhaustion of remedies requirement that a registrant present his claim for deferment to the boards and agencies of the system and take administrative appeals before coming into court.[3] The two are closely related but analytically separable.

Of course, *Falbo* was decided in the days when the physical examination and the induction ceremony were all held together at the same time and place. Today the usual[4] practice is to give a registrant a physical examination well in advance of the time he is due to be inducted, and to use the day set for induction for a few routine details. The induction day details are set out in AR 601-270, reprinted at SSLR 2227 *et seq.* However, courts have continued to hold that despite the relative lack of importance of the "remedies" available at the induction center that the rule on ripeness is to be the same–a registrant who wished to challenge the legality of his induction order must report for induction and refuse to submit.[5]

1. 320 U.S. 549 (1944).
2. 327 U.S. 114 (1946).
3. *See* Griffiths, *Some Notes on the Solicitor General's Memorandum in Oestereich*, 1 SSLR 4012, 4014 (1968). Both issues were involved in Wolff v. Selective Service Local Board No. 15, 372 F.2d 817 (CA2 1966), as the registrants had neither taken an administrative appeal (exhaustion of remedies) nor pursued the administrative process to its end in the induction center (ripeness).
4. Delinquents and registrants who have not had a physical within one year of the date set for induction will be examined at the induction center on the day set for induction. *See* AR 601-270, reprinted in SSLR's *Statutes & Regulatory Material* section.
5. *E.g.*, United States v. Irons, 369 F.2d 557 (CA6 1966). Though physical examinations are not usually given on the day set for induction, there are means at the induction center by which a registrant may yet be disqualified. *For example*, he must be given a physical inspection, denial of which invalidates the induction order and obviates his obligation to submit to induction. Briggs v. United States, –– F.2d ––, 1 SSLR 3144 (CA9 1968).

¶ 2455. Exceptions to the Rule––Section 10(b)(3)

The 1967 amendment to section 10(b)(3) of the Act governing judicial review reads:

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form . . ."

The Solicitor General of the United States has stated that section 10(b)(3) codified the pre-existing judicial

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rule on judicial review, that a registrant must still take all the steps up to the step forward into the military.[1] However, the plain meaning of "responded affirmatively or negatively" militates against such a reading,[2] and suggests that it is possible to read the statute as permitting judicial review in a prosecution for refusal to report. If a registrant responds affirmatively to an induction order in the sense of going through all the steps of the process and being inducted, there would be no "criminal procecution" and no defense to one would be necessary. Thus, "responded affirmatively" cannot logically mean "submitted to induction," and must mean something less, most logically going to the induction center and not submitting to induction. If that is so, "responded . . . negatively" must mean some lesser degree of compliance, that is, refusing to show up at all.[3]

Regardless of whether a literal reading of § 10(b)(3) compels the conclusion that the *Estep* rule is now relaxed, it surely does not compel the conclusion that the *Estep* rule may under no circumstances be relaxed by judicial interpretation.[4]

1. Memorandum for the Respondents, Oestereich v. Selective Service System Local Bd. No. 11, 1 SSLR 3027 (1968). Portions of the Memorandum are reprinted at 1 SSLR 3028, and it is discussed in Griffiths, *Some Notes on the Solicitor General's Memorandum in Oestereich*, 1 SSLR 4012 (1968). On the legislative history of the amendment to § 10(b)(3), *see* H.R.Rep. No. 267, 90th Cong., 1st Sess., at pp. 7, 30-31; Note, 81 Harv. L. Rev. 685 (1967). *See also* ¶ 23 n. 1 *supra*.

2. Watkins v. Rupert, 224 F.2d 47, 48 (CA2 1955), appears to be the source of the language of the 1967 amendment.

3. The suggestion was discussed in Griffiths, Book Review, 77 Yale L. J. 827, 831 (1968).

4. The legislative history of the amendment to § 10(b)(3) suggests that the Congress was concerned with cases like Wolff v. Selective Service Local Board No. 15, 372 F.2d 817 (CA2 1966), in which, as General Hershey put it in his testimony on the 1967 amendments, the courts did not give the System a chance to correct its own mistakes. If "giving the System a chance" is the important consideration, then exhaustion of *administrative appeals* is all that is important, to let the System rule on the registrant's claim. After he has exhausted, it would appear that he should be able to go directly to court, for his reporting to the induction center is merely a question of ripeness and not of exhaustion of remedies. There are a number of cases permitting challenge of an induction order by a registrant who had exhausted his administrative remedies but whose claim was not ripe for adjudication within the rule in Estep v. United States, 327 U.S. 114 (1946). *E.g.*, Townsend v. Zimmerman, 237 F.2d 376 (CA6 1956); *Ex parte* Fabiani, 105 F. Supp. 139 (E.D. Pa. 1952). This subject is treated in full in Part IV of this *Manual*.

¶ 2456. Exceptions to the Rule—Questions of "Law"

There is a series of arguments resting on the idea that the System's errors of law ought to be correctible more easily than its mistakes of fact, and permitting an argument that judicial review should at least in some cases be available in a prosecution for refusal or failure to report.

Cases from analogous fields do speak of "unusual circumstances" justifying relaxation of the ordinary judicial rules concerning review.[1] In cases involving exhaustion of remedies (in the sense of presenting claims for consideration within the Selective Service System), courts have fashioned a rule that when the I-A classification of a registrant and the induction order which follows in its train are or are claimed to be the result of a mistaken view of the law, the court will review the board's action even though the registrant did not take an administrative appeal. See ¶ 2409 *supra*. Strictly speaking, of course, these cases are not dispositive of the present issue, for the "ripeness" rule does not rest upon any view that the Selective Service System and the Department of Defense possess "expertise," but rather upon the view that the registrant should try every means he can to obviate the necessity of his obtaining judicial review. But perhaps the violation of statutory norms and other errors of "law" should be a basis for judicial review here, too. This argument is supported by reference to the Solicitor General's position in *Oestereich*, in which he argued that judicial review should be available, by means of injunction, to a registrant whose statutorily-commanded classification was denied him.[2] The distinction drawn by the Solicitor was between classifications based upon statutory command and those merely authorized by the statute to be granted by regulation. But the same principle might be held to apply to all "errors of law."[3]

The rule that one may generally challenge the constitutionality of a statute under which he is charged may be the basis for fashioning another "error of law" exception to the ripeness rule. "Unconstitutional" presumably includes "unconstitutional as applied." Since few claims of conscientious objection, ministerial exemption, or adherence by the boards to their own rules do not involve a claim of constitutional right, this

1. *E.g.*, Leedom v. Lyne, 358 U.S. 184 (1958) (challenge to agency action in excess of statutory powers entertained despite lack of statutory authority because otherwise statutory right would be illusory).

2. This portion of his memorandum is reprinted at 1 SSLR 3028, and discussed in Griffiths, *supra* ¶ 2455 n.1.

3. The concept of "errors of law" as a ground for challenging board orders is discussed *supra* ¶ 2409. When the issue to be heard is not beclouded by factual disputes, the rules concerning ripeness have been held to be relaxed. United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) is such a case. There the FCC had adopted a rule stating that licenses for television broadcasting would not be granted if the applicant had a direct or indirect interest in more than five other stations. Storer, which had reached the limit under the rule, sued for a declaration that the rule was unlawful. The Court concluded that his claim was ripe, resting its decision upon a finding of present harm to Storer. *See also* Leedom v. Kyne, *supra* note 1.

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"exception" might well swallow the ripeness rule. It finds support in the cases and in the tradition of criminal litigation.[4]

4. *E.g.*, Wolff v. Selective Service Local Board No. 15, 372 F.2d 817 (CA6 1966). In United States v. Butler, 389 F.2d 172, 1 SSLR 3071 (CA6 1968), the defense that conscription is unconstitutional was entertained on the merits in a prosecution for refusal to report. In United States v. Skinner, 1 SSLR 3042 (D. N.H. 1968), the defendant was acquitted of refusal to report for induction based upon board error in failing to entertain his CO claim. *But see* DuVernay v. United States, 394 F.2d 979, 1 SSLR 3170 (CA5 1968), holding that a registrant may not escape the consequences of a failure to take an administrative appeal by claiming denial of due process in the classification process. This issue is analytically distinct from that of failure to pursue the administrative process to its end.

4. *Refusal to Report for Physical Examination*

¶ 2476. Refusal to Report for Physical Examination

Part 1628 of the Selective Service Regulations provides for the physical examination of I-A, I-A-O and I-O registrants and others whom the local board believes will soon be available for service. See ¶ 1114 *supra.*

¶ 2477. Elements of the Offense

The elements of the offense are:

1. The requisite intent, wilfulness or knowingness.[1]
2. Refusal or failure to report as ordered, or, having reported, refusing to complete the examination as required.[2]
3. Arguably, a valid order to report.[3]

The offense rests upon the "duty" clause of Section 12(a) and upon the language of R1628.16. See ¶ 2205 *supra.*

The intent requirement is the same as in prosecution for a refusal to report for induction. See ¶ 2452 *supra.*

An outright refusal to report at all is relatively uncomplicated as an analytical matter, but difficult problems of judgment might be generated by a reporting accompanied by a refusal to submit to all or part of the examination.[4] Parts of the prescribed examination need not be submitted to, such as the personnel security inquiry. See ¶ 1117 *supra.* If a registrant had religious objection to a particular part of the physical examination, a close question arises as to the duty of induction center officials. Since it has been held that a religious objection to the medical aid which all inductees must make themselves subject to is a basis for classification I-O, perhaps the induction station officials and the local board have a duty to make inquiry into the registrant's claim, and to advise him of his rights.[5] Whether or not their duty extends thus far, they ought clearly to be required to process a written statement of such views as an application for CO status.[5]

There is apparently no decided case raising, as an objection to an armed forces physical, a claim that the registrant should have been I-O, and that had he been I-O, he would not be required to attend the phys-

1. *See*, in addition to the discussion of intent at ¶¶ 2404-2452 *supra*, United States v. Fujii, 55 F. Supp. 928 (D. Wyo. 1944), *aff'd* 148 F.2d 298 (CA10 1945), *cert. denied*, 325 U.S. 868 (1945), dealing with intent in a prosecution for failing to report for physical examination. And in United States v. Moorman, 389 F.2d 27, 1 SSLR 3020, 3021 (CA5 1968), the defendant's conviction for reporting for his physical one hour late was upheld in the face of a contention that his reporting only one hour late negated criminal intent not to report as ordered. The court held that the issue had been sent to the jury under proper instructions, and that the defendant's consistent course of conduct in violating a number of orders of his board justified an inference that his conduct was wilful.

2. United States v. Longo, 140 F.2d 848 (CA3 1944) (defendant did not report for physical; held, it was not a defense that he did report to his local board later in response to a delinquency notice).

3. No case has been found dealing with an improper order to report for physical examination. In United States v. Hertlein, 143 F. Supp. 742 (D. Wisc. 1956), the court held that a registrant had a duty to report for physical examination as ordered despite the pendency of an appeal from his I-A classification. *Hertlein* is right on the merits in light of the regulations dealing with who may be ordered to take a physical, ¶ 1114 *supra*, but the case ***did reach the merits*** of the defendant's claim that the order to report was invalid. Other grounds of invalidity might include improper issuance of the order to report. *Cf.* Brede v. United States, 396 F.2d 158, 1 SSLR 3098 (CA9 1968).

4. *See* Smith v. United States, 148 F.2d 288 (CA4 1945), *rev'd on other grounds*, 327 U.S. 114 (1946), holding that the duty to comply with the order to report includes the duty to submit to processing at the induction station.

5. The officials of the system have a duty to provide accurate information concerning a registrant's rights. Striker v. Resor, 283 F. Supp. 923, 1 SSLR 3019 (D. N.J. 1968); Keene v. United States, 266 F.2d 378 (CA10 1959); United States v. Liberato, 109 F. Supp. 588 (W.D. Pa. 1953).

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ical. However, it appears to be a perfectly reasonable defense, the only question being what sort of claim the registrant must make in order to put the board on notice of his position. The objection to permitting such a defense would be that it further undercuts the principle that a registrant must follow the administrative process to its end before litigating his classification. ¶ 2454 *supra.*

The "legality" of the order to report may be considered from another viewpoint. There are a number of errors in the selective service process which affect the validity of an induction order but which would not affect an order to report for physical, on the assumption that even though the board has made errors which would preclude it from inducting the registrant, it is still entitled to order him to a physical examination.[6] The counter-argument is that when a board makes a serious procedural error, such as classifying a registrant without basis in fact or violating a procedural right given him by regulation, statute or constitutional right, it loses jurisdiction and may not thereafter enforce its will against the registrant until it brings itself into compliance with the law and regulations. There is scant caselaw support for such an argument.[7]

5. United States v. Carson, 282 F. Supp. 261, 1 SSLR 3046 (E.D. Ark. 1968); United States v. Stafford, 389 F.2d 215, 1 SSLR 3040 (CA2 1968).

6. The board may order registrants who are not I-A, I-O or I-A-O to report for physical examination if "it determines" that induction may shortly occur. R1628.11(c).

7. All judicially-cognizable errors by the System are "jurisdictional" in character; Estep v. United States, 327 U.S. 114 (1946); Sunal v. Large, 332 U.S. 174 (1947) (dictum). In United States v. Federspiel, 1 SSLR 3042 (N.D. Ohio 1968), the registrant refused induction and gave as his reason that he was a conscientious objector, a claim which he had not made prior to that time. The board refused to reopen his classification. The court held that the board's refusal to reopen his classification deprived it of jurisdiction and was a defense to the prosecution for refusal to submit to induction. *Cf.* ¶ 1096 *supra*. The court took this view even though it might be said that the order to report for induction which Federspiel complied with only to the point of the order to step forward was not infected by any pre-refusal board misconduct, and that therefore Federspiel's claim of board error was not "relevant." But the court's decision necessarily takes an opposite view, casting some doubt upon the emphatic statement in Griffiths, *Some Notes on the Solicitor General's Memorandum in Oestereich*, 1 SSLR 4012, 4014 (1968) that "relevance" is a prerequisite to judicial review.

¶ 2478. Venue

Venue will generally be laid at the place where the defendant failed to report (which will be either his local board or the AFEES station itself)[1] or at the site of the Armed Forces Examining and Entrance Station in the event of a failure to submit to examination at the station. The regulations, R1628.16, seek to establish a continuing duty to report not only from day to day, but to every local board within whose jurisdiction the registrant may be. Whether or not this provision has the effect of permitting prosecution of the registrant in any judicial district through which he passes or in which he is found is questionable.[2]

1. The order to report for physical examination, reprinted at SSLR 2156:21, requires the registrant to report at a given place for forwarding to an AFEES. *Thus*, the discussions of venue at ¶¶ 2211, 2405, 2428, 2453 *supra* are in point.

2. *Compare* United States v. Johnson, 323 U.S. 273 (1944) ("continuing offense" concept should not be used to defeat vicinage requirement of sixth amendment) *with* Johnston v. United States, 351, U.S. 215 (1956) (venue of refusal to report for civilian work).

5. *Refusal or Failure to Register*

¶ 2501. Refusal or Failure to Register—Generally

The requirement of registration is complex, resting upon a series of Presidential proclamations and regulatory provisions. See ¶ 1007 *supra* for a complete discussion of who must register and the details of the registration process.

¶ 2502. Elements of the Offense

The elements of the offense are:

1. The proscribed intent, in this case knowingly, or wilfully.[1]

2. A refusal or failure to fulfill any one or more of the requirements relating to registration, including the duty to present oneself for registration and the duty to give required information.[2]

3. That the defendant was a person required to be registered under the Act.[3]

The intent element does not, apparently, embrace *actual* knowledge that one is required to register,

1. *See* Kaohelauli v. United States, 389 F.2d 495, 1 SSLR 3063 (CA9 1968).

2. *Id.*; *see* ¶ 1007 *et seq. supra.*

3. *Id.*; *see* ¶ 1007 *et seq. supra.*

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given the "constructive notice" provisions of the Act concerning the duty to register.[4] However, no court has been squarely presented with the limiting case of one who could in good faith claim ignorance of the law's requirement.

When the offense is more narrow than outright refusal or failure to present oneself for registration, the question of intent becomes more refined. A defendant's contumacy or refusal to give certain information or to sign the registration card might or might not be with the intent of violating the law.[5] Moreover, the definition of "failure" to register bears upon the question of intent and sharpens the meaning of "intent" in this context. While there is little question as to the legal position of outright failure to present oneself for registration, the cases are divided on the question of what one must do once he has presented himself. This question is discussed, with citation of authority, at ¶ 1010 *supra.* Since the duties of the registrant in assisting the system to register and classify him are not well defined in the regulation, it seems possible to urge a narrow construction of the statute so as not to visit criminal liability upon one whose conduct infringed no real interest of the System. The cases finding no crime in a registrant's refusal to give information or do things asked of him at registration seem to rest upon a salutary "constructive compliance" rationale which expresses and supports this theory. See ¶ 1010 *supra.* That is, if the registrant gives the clerk enough information to enable her to fill out the required forms, he should perhaps be held to have complied with the criminal liability provisions of the Act. However, his refusal to give information relevant to classification, although not required to effect a complete registration, may subject him to being classified I-A and perhaps declared a delinquent. See ¶ 1010 *supra.*

The third element, that the defendant is a person required to register, has reference to the myriad rules concerning who must be registered, as set out in ¶ 1007 *supra.* The proof is not difficult in the typical case of a citizen who may easily be shown to be over 18. However, the proof may become more complicated in the case of, for example, an alien who must fulfill certian technical requirements in order to be required to register. See ¶¶ 1007-15 *supra.*

4. § 15(a) of the Act is the "notice" provision; *see* ¶ 28 *supra*. However, the court said in *Keohelauli, supra* note 1, that "it can be clearly said that he has declined or refused to register if *knowing his duty to register* he has failed to do so." 389 F.2d at 498, 1 SSLR 3063. This dictum permits one to argue that actual knowledge of the registration requirement must be proven, or at least that lack of such knowledge is an affirmative defense. In *Kaohelauli*, the failure of the defendant to register though he had lived in the United States all his life and had every reason to know of the law's requirements was a significant factor. *Cf.* Lambert v. California, 355 U.S. 230 (1958). When a crime of *omission* is charged, the defendant's conduct and circumstances may provide an inference of intent. *E.g.,* Moorman v. United States, 389 F.2d 27, 1 SSLR 3020 (CA5 1968).

5. *See* ¶ 1010 n. 1 *supra*.

¶ 2503. Venue

No decided case has considered the question of venue, and the law requires a registrant to register within five days of his eighteenth birthday, unless circumstances prevent, at the nearest local board. See ¶ 1007 *supra.* One required to register has a continuing duty to do so, R1611.7(c). By combining these rules, the government has decided in general to prosecute the case wherever the defendant is apprehended. Theoretically, the government could prosecute him in any jurisdiction in which he had been since reaching the age of 18 years and five days, provided it could be shown that he had been in that jurisdiction within the statute of limitations period of five years. Such a choice would raise serious objections, however. See ¶ 2478 *supra.*

¶ 2504. Statute of Limitations

The cases are divided on the statute of limitations in a registration refusal case. *United States v. Toussie*[1] holds that the statute runs five years after the defendant reaches 26. The theory of *Toussie* is that the duty to register is continuous only from the day a male otherwise required to register reaches 18 years and five days until he reaches 26, with an extension to 35 for doctors, dentists and allied medical specialists. Therefore, the indictment must be returned within five years of the last day on which a defendant has a duty to register. 18 U.S.C. § 3282. See ¶ 2213 *supra.*

To the contrary is *McGregor v. United States,*[2] which affirmed the conviction of a defendant who was born September 18, 1922 and was therefore required by Proclamation 2799 to register on August 30, 1948, and every day thereafter as a "continuing duty." The court said that even though the indictment was returned more than three years (the then-current limitation period--now five years) after August 30, it was not barred, citing R1617.11(c) language concerning the continuing duty to register. *McGregor*, as the court

1. 280 F. Supp. 473, 1 SSLR 3062 (E.D. N.Y. 1967).

2. 206 F.2d 583 (CA4 1953).

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pointed out in *Toussie,* is an ill-reasoned case. First, both lawyers and the court appear to have missed the crucial issue entirely. Section 3 of the Act established the

> "duty of every male person . . . who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration . . ."

Thus, the continuing "duty" established by the Proclamation and by R1617.11(c) lasts only for the eight year period during which a male is between eighteen and twenty-six. McGregor thus had a duty to register on August 30, 1948, and a duty continuously thereafter up to and including September 18, 1948. As the statute of limitations then stood, at three years, he could be prosecuted for his failure to register any time within three years of the last date on which his duty existed, that is, any time up to September 18, 1951. August 30, 1948, contrary to the court's interpretation of the problem, had nothing whatever to do with the case. Looking at the relevant date, September 18, the indictment in *McGregor* was also barred by the statute of limitations. The case on which the court relied in *McGregor, Fogel v. United States,*[3] involved a male with a duty to register up to his sixty-fifth birthday, as *Fogel* arose under the 1940 Act. Fogel was thus obligated by statute to register at the time the indictment was returned against him, and his case lends no support to the *McGregor* holding.

Based on this reasoning, the sounder view is that an indictment for failure to register is barred by the statute if it is returned more than five years after the last day on which the defendant was obliged to register.

3. 162 F.2d 54 (CA5 1947).

6. *Failure to Perform Sundry Other Duties*

¶2526. Failure to Perform Sundry Other Duties

The statute and regulations establish many other duties including the duty to furnish the board with notices of change of address and miscellaneous other information bearing on classification. These offenses may be discussed together for ease of presentation and analysis.

¶2527. Elements of Offenses

All offenses based on a failure to perform a duty require that the element of criminal intent be present, usually the element "knowingly."[1] In addition, there must be some duty defined by the statute or regulations which the registrant has failed to perform. Whether or not the term "duty" or the term "shall" must appear in the regulation or statutory provision relied upon to create the duty is an open question. See ¶2004 *supra.* If the duty is to file a paper or submit information or do a particular act based upon an individually addressed command from the local board, it must additionally be shown that the defendant has actual or constructive notice that he was to perform the duty required by the board's command.[2] Whether he must also have notice that failure to perform the duty will result in prosecution, as opposed to the imposition of administrative sanctions through the delinquency machinery, is also an open question. See ¶2005 *supra.* What is clear is that the duty must somehow be established by the government to exist and to be the subject of criminal penalty for noncompliance. What is in doubt is only the standard to be used in making that judgment.

The validity of the specific direction which the registrant did not obey, in a case involving violation of an individually addressed commands, is open to the same questions as those discussed in ¶¶2005, 2452, 2477 *supra.* However, in general, absent clear errors such as improper address,[3] misspelled names,[4] and other clerical errors which are clearly prejudicial to the registrant, the validity of a particular command or request to furnish information will be assumed.[5]

1. "Knowingly" is the term used throughout § 12(a). Even if a particular phrase defining an offense should not be qualified by the term "knowingly," the court would no doubt read it in. Morissette v. United States, 342 U.S. 246 (1952).

2. United States v. Haug, 150 F.2d 911 (CA2 1945) (defendant not guilty of failing to return questionnaire which was misaddressed and which would not have been given to him had he called at former address to ask for his mail).

3. *Id.*

4. *Id.*

5. As to possible self-incrimination problems in furnishing information, *see* United States v. Toussie, *supra* ¶2504 n. 1, and cases cited therein. *See also* Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968).

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¶ 2528. Venue

The venue for prosecutions of this class of offenses will most likely be laid in the judicial district in which the local board is located. It is to the local board that the registrant owes the obligation to report. and he is required to perform most duties by appearing at or mailing something to the board.[1] The problem of venue is, therefore, solved by reference to those cases which hold that venue may be laid in Forum I when a registrant omits in Forum II to perform a duty owed to an entity in Forum I. Certainly this has been the rationale governing venue choices in Selective Service prosecutions, again subject to challenge by means of a motion under Federal Rule of Criminal Procedure 21(b). See ¶ 2211, 2405, 2428, 2453 *supra*.

1. *See* the discussion of the venue cases, particularly Travis v. United States, 364 U.S. 631 (1961) (venue for mailing a false affidavit from Colorado to NLRB in Washington is Washington), at ¶ 2211 *supra*.

¶ 2529. Defenses—Substantial Compliance

The cases do not speak with one voice on the question whether substantial compliance with a duty to give information, report changes of status, or to comply with an individually-addressed command is a defense to a prosecution for refusal or failure to perform the duty. In *Bartchy v. United States,*[1] the Supreme Court addressed the question of reporting changes of address, and held that the requirement of the law was satisfied by a registrant leaving a chain of forwarding addresses, so that mail would reach him in time for compliance with instructions from his local board. This common sense approach has been followed in other cases. However, in cases in which the registrant utterly omitted to provide requested information and relied upon someone else who also had a duty to provide it to inform the board, such as his employer, the courts have held that the registrant may be convicted.[2]

No clear rationalizing principle appears from the scanty case authority, but one may be suggested: If the registrant's noncompliance was not likely to injure the board in the performance of any of its statutory functions, then it should not be regarded as substantial.[3] The registrant who utterly omits to perform a duty in reliance upon the board getting its information from someone else has no justifiable expectation that the board will be able to do its job. Moreover, he is more likely than a registrant who is in substantial compliance with board orders and with other duties to have the intent proscribed by the statute; a subject discussed in ¶ 2530.

1. 319 U.S. 484 (1943). In Caldwell v. United States, 139 F.2d 121 (CA5 1943), the court dismissed an indictment for failure to report change of address, for misstating the regulatory requirement as to reporting.

2. United States v. Wain, 162 F.2d 60 (CA2 1947), *cert. denied*, 332 U.S. 764 (1947). *Compare* United States v. Lembo, 76 F. Supp. 209 (E.D. Pa. 1948), *aff'd sub. nom.* United States v. Aleli, 170 F.2d 18 (CA3 1948).

3. *Cf.* United States v. Rubinstein, 166 F.2d 249 (CA2 1948), *cert. denied*, 333 U.S. 868 (1948), holding that a registrant could not be convicted under the false statement provisions of § 12(a) when at the moment he made the allegedly false statement he said he did not intent to rely upon it. The rationale of the holding is that no harm could have been done the System from his falsehood.

¶ 2530. Defenses—The Problems of Intent

Bartchy v. United States, discussed ¶ 2529 *supra,* rested in part upon the registrant's having meticulously informed the board just how to reach him at any given time. The element of intent bears very heavily upon decisions in this field, as a practical matter as well as in analysis of the offenses involved. For example, in *United States v. Haug,*[1] the court held that the registrant could not be convicted for failing to return his classification questionnaire because it had been mistakenly sent to "Ivar Hang," and thus misaddressed would not have been given to him had he called for it. On the other hand, in *United States v. Wain,*[2] it was held that a registrant was not excused from notifying his board of changes in his employment status merely because his employer was also, to Wain's knowledge, required to inform the local board of such changes. Wain, it could be said, had the intent not to tell his board that which the law said it was entitled to know and to know *from him.* In that sense, whether the board was actually misled or not becomes less important than the combination of a state of mind which is negligent about obligations to report or perform other duties and a clear direction that a report be made or a duty performed. When these two elements come together, *Wain* holds, the law is violated. This reading seems harsh, for it omits to consider whether the board is actually injured or not by the registrant's conduct, but looks only to the question of intent and conduct, narrowly defined.

1. 150 F.2d 911 (CA2 1945).

2. ¶ 2529 n. 2 *supra.*

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7. *Offenses Involving False Statements*

¶ 2551. False Statements—Generally

Federal criminal law is full of false statement provisions, and the authorization in the regulations (R1604.57) for oaths to be administered may perhaps bring into play in the Selective Service System the general perjury statute, 18 U.S.C. § 1621, as well as the false statement statute 18 U.S.C. § 1001,[1] which does not require that the statements be made under oath in order to be punishable. Section 12(a), however, defines two categories of punishable false statements: those made by persons who are members and officials of the system, and those made by any person. In addition, it may be possible to charge a false statement to be an aid to evasion of registration and service, although such a reading of Section 12(a) would violate the accepted rule that:

> "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment . . .' "[2]

1. Chapter 47 of the Criminal Code, 18 U.S.C. §§ 1001 *et seq.*, contains a series of statutes proscribing various sorts of falsehood and fraud. On the interpretation of 18 U.S.C. § 1001, *see* Friedman v. United States, 374 F.2d 363 (CA8 1967).
2. Fourco Glass Co. v. Transmirra Prod. Corp., 353 U.S. 222, 228-29 (1957).

¶ 2552. False Statements—Elements of the Offenses

Section 12's first list of false statement offenses describes the elements of offenses which may be committed by members of the System:

> "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, . . . or having and exercising any authority under said title, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster . . . "

The elements are thus intent, being a member of the System or having a duty to perform, and the making of a false statement.

In addition, the statute prohibits anybody from "knowingly" making, or being a party to making "any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification . . . " Thus the elements of this offense are intent, falsity, and something akin to "materiality."

The intent to falsify is of course important. The use of "knowingly" in this context clearly seeks to reach corrupt falsehood used with the intent to mislead the board into doing something it would otherwise not have done.[1]

The materiality required in the second of the two falsity provisions – "bearing upon a classification" – has been construed to mean not only substantive materiality, in the sense that the statement must really be germane to a classification issue, but also to introduce a requirement that the board actually have been misled or have been liable to be misled. Thus a statement irrelevant to a registrant's classification is not a basis for prosecution, and a statement on which the registrant indicates (at the time he makes it) he does not mean to rely has been held not criminally punishable.[2] These are, of course, matters which the government must prove in its case in chief.

1. United States v. Rubinstein, 166 F.2d 249, 257 (CA2), *cert. denied*, 333 U.S. 868 (1948).
2. *Id.* at 255 n. 7.

¶ 2553. Venue

Venue is laid in the district wherein the statement is designed to be used, and where the damage was done by it. It is possible to speak unequivocally even in the absence of direct authority, unless the case of *Travis v. United States*[1] should someday be undermined or overruled. In *Travis*, the defendants had allegedly sent false affidavits to the National Labor Relations Board in Washington; the affidavits had been mailed from Colorado. The Supreme Court held venue was properly laid in Washington, D. C., and that holding was later the basis for an ameliorative in the form of the 1966 amendment to Rule 21(b). See ¶¶ 2211, 2405, 2428, 2453 *supra*.

1. 364 U.S. 631 (1961).

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¶ 2554. Special Problems—Pleading Falsity

There is a well-established rule that falsity must be pleaded with particularity in a federal criminal case, whether the falsity be part of a perjury case, of a false statement case or of a conspiracy to falsify records.[1] The rule extends not only to the indictment itself which must set out the alleged false statements and identify the manner in which they were false,[2] but will also entitle the defense to a fuller bill of particulars than otherwise.[3] See ¶ 2203 *supra.*

1. United States v. Bougie, 118 F. Supp. 359, 360 (S.D. Calif. 1954).
2. United States v. Devine's Milk Laboratories, 179 F. Supp. 799, 800-01 (D. Mass. 1960).
3. United States v. Cafaro, 26 F.R.D. 170, 172 (S.D. N.Y. 1960); United States v. Onassis, 125 F. Supp. 190, 213-14 (D. D.C. 1954); United States v. Yetman, 196 F. Supp. 473 (D. Conn. 1961).

¶ 2555. Special Problems—Pleading "Materiality"

The "materiality" requirement in § 12 is not unlike the materiality requirement in a perjury case (18 U.S.C. § 1621) and the "pertinent to the subject matter under inquiry" requirement in a contempt of Congress prosecution under 2 U.S.C. § 192. That is, unless the allegedly false statement was relevant to something the board had or might have under consideration, it is not punishable. See ¶ 2552 *supra.* And given the wide range of possible concerns of a board, it is not too much to expect that the government should set out in the indictment just how and to what the allegedly false statement was material. Such a rule would also ensure that the grand jury, and not the prosecutor or the court, chooses the theory upon which the case is to be brought. This argument finds support first in *Russell v. United States,*[1] which held that the pertinency to the subject matter under inquiry of questions not answered by an allegedly contumactious witness must be pleaded with particularity in a prosecution for contempt of Congress under 2 U.S.C. § 192. And *Russell* cast into doubt the uncritically-repeated rule that materiality might be alleged in general terms in a perjury indictment; this aspect of the Court's holding which was noticed and applied in the perjury case of *United States v. Cobert,*[2] in which the court ordered the indictment dismissed based upon an analysis of a number of perjury cases. This authority argues for particularized pleading in selective service false statement cases as well.

1. 369 U.S. 749 (1962).
2. 227 F. Supp. 915 (S.D. Calif. 1964).

¶ 2556. Special Problems—Foreclosure from Making Defenses of Unconstitutionality

As a result of the Supreme Court's decision in *Dennis v. United States,*[1] it is highly likely that defendants in false statement cases will be precluded from raising defenses based upon the unconstitutionality of the requirement that a particular statement be made. For example, a defendant charged with making a false statement in a registration certificate would not be permitted to defend on the ground that the registration requirement of § 3 of the Act is unconstitutional. The basis for this conclusion, which is only as valid as the *Dennis* holding itself,[2] is this: In *Dennis,* leaders of a union were charged with filing false Communist disclaimer affidavits with the National Labor Realtions Board in order to obtain certification of their union under the Taft-Hartley Act. The Supreme Court held that the defendants were precluded from raising the asserted unconstitutionality of the affidavit provision of Taft-Hartley in their criminal trials. By electing to perjure themselves, the Court held, the defendants forewent the right to challenge the statute, a right which they would have had if they had refused to sign the affidavits and brought suit to compel the NLRB to certify their union. The *Dennis* problem of foreclosing defenses is one which must be considered in false statement cases. See ¶ 2307 *supra* for further discussion.

1. 384 U.S. 855 (1966).
2. There was a dissenting opinion in *Dennis* on this issue, pointing out that to insist that the defendants attack the statute directly might effectively deprive their unions of certification to which they were entitled. 384 U.S. at 880, 881.

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8. Offenses by Selective Service Officials

¶ 2576. Prosecuting the System's Officials

Section 12(a), in the portion quoted above at ¶ 2552, makes it a crime for a "member of the Selective Service System" and for "any other person charged as herein provided with the duty of carrying out any of the provisions of" the Act to fail to perform his statutory duties, make or be a party to making, *inter alia,* any false improper or incorrect "classification" or "physical or mental examination." There appear to have been no cases brought under this provision, at least in so far as the reports show. There have been prosecutions of system agents and officials, but these have been brought under the bribery and conspiracy provisions of the Criminal Code rather than under § 12(a).[1]

However, it appears that any knowing breach of duty by a System official, or any knowingly improper classification decision would render an official subject to criminal prosecution. Included in this class would be those instances in which a local board clearly defies the regulations and the law in classifying a registrant. The likelihood of such prosecutions is marginal, indeed.

1. Cohen v. United States, 144 F.2d 984 (CA9 1944), *cert. denied,* 323 U.S. 797 (1945). *See* ¶¶ 8, 25 *supra.*

9. Counselling or Aiding Refusal or Evasion

¶ 2601. Counselling, Aiding and Abetting Refusal or Evasion

The statutory provision, § 12(a) of the Act, now reads:

> "[A]ny person . . . who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any requirements of this title, or of said rules, regulations, or directions . . ."

The above language has been in the Act since 1948. The 1940 Act, in Section 11, contained language virtually identical to that quoted, except the term "refuse" did not appear along with the term "evade," a difference which, as shown at ¶ 2604 *infra,* may be of some significance.[1] The 1917 Act merely contained the statement that evading registration was a crime as was aiding another to evade. The decisions construing these provisions are notable for their opacity.

1. There is no explanation in the legislative history of any of the changes made in the 1948 version of the penalties section, save the cryptic comment, "Certain changes in language have been made to incorporate judicial determinations made pursuant to the predecessor act." Otherwise, the Senate Report said, the language "substantially" reenacts the 1940 provisions. S.Rep. No. 1268, 80th Cong., 2d Sess., as reprinted in U.S.Code Cong. & Adm. News 2008 (1948).

¶ 2602. Elements of the Offense

The element of intent, "knowingly," is present, and apparently contemplates that the defendant must have had the specific intent to bring about evasion or refusal.[1] "Counselling," "aiding" or "abetting" must be shown, and are the subject of discussion below. Finally, there must be some duty under the Act and regulations which the defendant sought to have another evade.[1a] Whether the person counselled, aided and abetted must have actually evaded or refused to perform the duty in order for the accessorial crime to be complete has been the subject of two court of appeals cases, which are the only appellate cases on point. Both of these cases held that consummation of the principle offenses was not necessary.[2] As is argued below, these cases are subject to substantial question.

The two principal problems in defining the elements of the offense have been the concentration of the courts upon the first word of the three, "counsels," to the exclusion of the others, and the courts' tendency in construing the language of the provision, to ignore the teaching of carefully-developed rules concerning principal and accessory in the criminal law generally.

1. Gara v. United States, 178 F.2d 38 (CA6 1949), *aff'd by an equally divided Court,* 340 U.S. 857 (1950). *See* ¶ 25 *supra.*

1a. It is not a crime to aid and abet an innocent act. Shuttlesworth v. City of Birmingham, 373 U.S. 262 (1963).

2. Gara v. United States, *supra* note 1; Warren v. United States, 177 F.2d 596 (CA10 1949), *cert. denied,* 338 U.S. 947 (1950).

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The first of these problems, the isolation of the word "counsels" from its context in § 12(a), has led to decisions such as *Warren v. United States*[3] and *Gara v. United States*,[4] in which the defendant's merely speaking to others to urge a posture of resistance to the draft was made the subject of a criminal conviction. *Keegan v. United States*,[5] the World War II German-American Bund "conspiracy to counsel" case, comes very close to making this mistake as well, but *Keegan* is susceptible of the interpretation that the Bund conspiracy was treated as a common emprise designed to go beyond speech and advocacy and to assist members in refusal of service. Punishing speech which merely encourages or urges refusal or evasion is risky business under the constitution,[6] but that is not the sole problem. The words "counsels, aids, or abets are written together in the statute, and accepted principles of statutory construction permit one to argue that they should be read together as meaning the same thing, or at least as describing the same kind and quality of conduct.[7] This is especially so given the listing of aids and abets along with counsels, advises, procures, and commands in the general federal accessory statute, 18 U.S.C. § 2 and the body of judicial literature construing the various terms as forming a related and almost interchangeable group of accessorial crimes. To be an "aider and abettor" under 18 U.S.C. § 2,

> "A defendant [must] in some sense associate himself with the venture, . . . [must] participate in it as in something that he wishes to bring about, . . . [must] seek by his action to make it succeed."[8]

If this reading is adopted, the words counsels, aids or abets would be read together in § 12(a) of the Selective Service Act and conviction would require that the defendant have actively joined in and made himself part of a plan of action to bring about refusal or evasion. Viewed in this light, the statute would not reach acts such as those of the defendants in *Gara* and *Warren*, for in those cases there was not sufficient showing that the defendant did other than engage in speech.

This leads to a consideration of the second problem. In both *Gara* and *Warren*, the courts said that the government need not prove, in a counselling, aiding and abetting prosecution, that the person or persons counselled actually evaded or refused to perform a duty under the Act. In *Warren*, the court rested this statement upon the proposition that the consummation of the offense was a required element of a prosecution for aiding and abetting brought under 18 U.S.C. § 2[9] and that to introduce such a requirement into § 12 would render its "counsels, aids or abets" language simply redundant as all acessorial crimes could be prosecuted under § 12 of the Act and 18 U.S.C. § 2. To begin with, one should note that such an exuberant reading of the section is not necessary to enforce the law, as the conspiracy provisions of § 12 would still exist to punish aiding and abetting of inchoate crimes. Moreover, it has been recognized that other provisions of § 12 duplicate provisions of 18 U.S.C. This is probably the result of historical accidents of draftmanship as the statute wended its way through the 1917, 1940 and 1948 versions. Finally, in *Warren*, the court did not purport to rest upon more than the statutory language "counsels," and its statement is the narrow one that it need not be shown that anyone "counselled" by a defendant actually did what he was counselled to do. This reading is absurd, for it utterly omits to consider "aids or abets," as to which presumably it would have to be said that proof of consummation of the principal offense is required to obtain a conviction.[10]

In sum, the sounder analysis would appear to be that counsels, aids and abets should be read together in light of the general federal criminal law of accessorial offenses, and by this means the reach of this portion of § 12(a) should be narrowed.

3. *Supra* note 2.
4. *Supra* note 1.
5. 325 U.S. 478 (1945).
6. Yates v. United States, 354 U.S. 298 (1957), discussed ¶ 2656 *infra*. *See also* ¶ 25 *supra*; Bond v. Floyd, 385 U.S. 116, 113-35 (1966).
7. The maxim is "*Noscitur a sociis*" (a word may be known from the meaning of its associates). Black, Law Dictionary 1209 4th ed. 1951).
8. Nye & Nissen v. United States, 336 U.S. 613, 619 (1949).
9. This statement remains true today. Hendrix v. United States, 327 F.2d 971 (CA5 1964); Roth v. United States, 339 F.2d 863 (CA10 1964). *See* note 1a *supra*.
10. Note 9 *supra*.

¶ 2603. Venue

At common law the venue of an accessorial crime was laid where the acts of the aider and abettor were committed, and venue could not be laid where the crime itself was consummated.[1] However, it has been held that Federal Rule of Criminal Procedure 18 and 18 U.S.C. § 2 provide impliedly for venue to be laid, in a prosecution of an accessory, where the crime itself was committed, as well as where the acts of the aider and abettor were performed.[2] This holding is open to some question. In the selective service field, if the *Warren*

1. United States v. Bozza, 365 F.2d 206 (CA2 1966). *But see* Am. Jur. 2d, "Criminal Law," § 129.
2. *Id.*

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holding[3] (that "counsels, aids and abets" describes a principal and not an accessorial of offense and that the consummation of the crime is immaterial) is to stand, there would be no basis whatever for permitting the government to lay venue at the place where the person counselled consummated the crime of evading or refusing to perform a duty, for consummation would be immaterial to the prosecution of the counsellor, aider or abettor.

Even if the *Warren* holding is wrong, however, it seems contrary to the history and spirit of the sixth amendment to permit venue to be laid in a judicial district where the defendant has never been, when the focus of the charge against him is the carrying on of acts of commission (rather than omission, see ¶¶ 2428, 2453 *supra*) which have a direct and immediate result in the judicial district in which they are done (as opposed to having no proximate result save in another district).[4] Even if the alleged aiding and abetting is by means of conduct resembling speech, it appears that the government's venue choices should be circumscribed. However, uncritical following of the precedents developed in other contexts which may suggest themselves as analogous will permit the government to lay venue in either the forum in which the aiding took place or the forum in which the evasion took place.

3. Warren v. United States, discussed at ¶ 2602 *supra*.

4. As was the case in Travis v. United States, 364 U.S. 631 (1961), in which the false statement mailed from Colorado was designed to and did have an effect in Washington, D.C.

¶ 2604. Defenses——The Keegan-Okamoto Doctrine

In *Keegan v. United States,*[1] the Supreme Court reversed the conviction of a group of German-American Bund members for conspiracy to counsel evasion of registration and service. It will be recalled that the term "refuse" did not appear in the statute as it then read.

The Bund members had joined together for various purposes and among the documents they issued was one which stated that the draft was illegal and called upon Bund members and others to refuse to serve. It was apparently contemplated that Bund members would register, but would not serve when called. There were three opinions, concurred in by five Justices, which made up the majority view. The plurality opinion, adhered to by three justices, said that "evasion" meant fraudulent conduct, such as slipping away and hiding. If one registered and then refused to serve when called, that was a different matter. The opinion concluded its analysis with this statement:

> "One with innocent motives, who honestly believes a law is unconstitutional, and therefore, not obligatory, may well counsel that the law shall not be obeyed; that its command shall be resisted until a court shall have held it valid, but this is not knowingly counselling, stealthily and by guile, to evade its command."[2]

It appears, therefore, that this language rests the plurality opinion upon the distinction between "evasion," which the opinion regarded as conduct which defrauded the system by stealth, and "refusal," which could be a means of making a test case on the legality of the draft. Justice Black concurred in the result on bill of attainder grounds[3] and Justice Rutledge, the fifth vote for reversal, expressly stated that the difference between evasion and refusal was immaterial.[4]

The quoted language was regarded as expressing the clear view of a majority of the Supreme Court's members in *Okamoto v. United States.*[5]

Since the 1948 Act expressly includes "refuse" as well as "evade" the continuing vitality of the *Keegan* defense is a matter open to question.

The argument for *Keegan's* continued vitality rests upon the view that the case invovled two related but separate propositions, one, that evasion and refusal were to be distinguished from counselling that persons so inclined use the criminal courts to test the validity of the draft or of the purposes for which it is used, or the manner of its organization and conduct.

This reading is reinforced by the *Estep* line of cases, which make clear that the criminal process is almost the only means of obtaining judicial review of selective service errors (the 1967 amendment to § 10(b)(3) of the Act states literally that it is the only means), and by the renewed importance of litigation as a means to vindicate rights generally.[6]

The court in *Keegan* spent a great deal of time analyzing not only the Bund's emphasis on refusal rather than evasion or fraud but also its insistence upon a "test case," the plurality opinion even going so far as to set out the portions of the record dealing with the proper translation of the German word which

1. 325 U.S. 478 (1945).
2. 325 U.S. at 493-94.
3. 325 U.S. at 495.
4. 325 U.S. at 498.
5. 152 F.2d 905 (CA10 1945). *See* ¶ 25 *supra*.
6. *See, e.g.,* NAACP v. Button, 371 U.S. 415 (1963); Ginger, Litigation as a Form of Political Action, 9 Wayne St. L. Rev. 458 (1963).

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might have meant merely "precedent," but which the Court concluded on the evidence meant a "legal test case."

Finally, that portion of *Keegan* which rejects, as a basis for criminal liability, counseling that registrants use the machinery of the system to obtain lawful deferment or exemption, is surely still valid.[7]

The question which has often come up in recent years, that of "support" as distinguished from counseling, is not resolved in the case law. The defendant in *Gara* claimed that he merely stood by those who broke the draft laws as a result of their own decisions, but the contention was rejected on the facts, a disposition which suggests the validity of the distinction between support and counselling rather than the contrary. Generally, one who merely succours, supports and assists a registrant who is determined to violate the law should not be punishable, absent some conduct which could be considered as accessorial.

7. *See* United States v. Schactrup, 140 F.2d 415 (CA7 1944); Bond v. Floyd, 385 U.S. 116, 133-35.

¶ 2605. Defenses—The First Amendment

The narrow reading of "counsels" suggested above fits as well into the first amendment analysis made here. The leading case in this sphere is *Bond v. Floyd,*[1] in which a Georgia state legislator-elect was denied his seat by the legislature on the ground, among others, that he had counselled young men to refuse induction and to burn their draft cards. The statement which he subscribed to in this regard, as interpreted in the light of this subsequent utterances, was said by the Court not to be subject to prosecution under the Act, as interpreted in light of the first amendment, and hence not the proper subject of inquiry by the Georgia legislature in looking into Bond's qualifications.

In reaching its decision, the Supreme Court cited three cases: *Terminiello v. Chicago,*[2] *Yates v. United States*[3] and *Wood v. Georgia.*[4] *Terminiello* is a "clear and present danger test" case of classic importance. It involved a Chicago meeting in which the defendant made a number of vicious and inciteful anti-Jewish and anti-Negro remarks while a crowd outside sought to storm the hall. The Court reversed his breach of the peace conviction, saying that in order to secure a conviction there must be a clear and present danger of an evil "rising far above the public inconvenience, annoyance or unrest."[5] *Wood v. Georgia* is also a case resting upon the "clear and present danger" rationale and holding that remarks by a sheriff directed generally at the administration of justice in his community were not punishable. Thus, these two cases, in connection with *Bond,* would teach that speeches and utterances directed at groups of registrants or to registrants generally through political activity of an organizational type familiar to everyone would not be punishable unless it could be shown that the direct result of the speech was some identifiable act or acts of illegal refusal or evasion or that a clear and present danger of such acts was created. The mere tendency of speech to produce refusal or evasion would not be a basis of liability and the statement in *Gara* to the contrary[6] may be regarded as overruled by *Bond.*

The reference to *Yates v. United States* is perhaps the most interesting feature of the *Bond* opinion on this score, for in *Yates* the Court set out rigorous standards of proof that must be met by the prosecution in proving conspiracy to advocate violent overthrow of the government. Of particular interest, in this connection, is the Court's holding that mere "urging" could not be a crime if the statute there involved, the Smith Act, were to be construed consistently with the first amendment.[7] It may be surmised that mere urging would not suffice for conviction in a "counselling" prosecution under § 12 of the Act.

Thus, the first amendment speaks directly to the counselling language of § 12, and in two ways, First, it places limits upon the government in prosecuting speech conduct as "counselling," and perhaps more important, it may lead to the adoption of a narrowing construction of "counsels, aids, or abets" lest a succession of constitutional doubts be created.[8]

1. 385 U.S. 116, 133-34 (1966).
2. 337 U.S. 1 (1949).
3. 354 U.S. 298 (1957).
4. 370 U.S. 375 (1962).
5. 337 U.S. at 4.
6. Gara v. United States, *supra* ¶ 2602 n. 1, 178 F.2d at 40.
7. 354 U.S. at 317-20.

8. The Court will, when possible, seek a limiting construction of a statute bearing upon freedom of expression in order to avoid constitutional doubts. Schneider v. Smith, 390 U.S. 17 (1967). But the meaning of a vague criminal statute may not be hammered out in a series of criminal prosecutions. The statute here under consideration may not be rescuable by a limiting construction, but may have to be struck down entirely. *See* Dombrowski v. Pfister, 380 U.S. 479 (1965).

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¶ 2606. Act Counselled Not A Crime

Both *Gara* and *Warren* begin with the holding that the acts there counselled, principally refusal to register, constitute crimes under § 12 of the Act. By implication, it would appear that if the act counselled is not a crime, then counselling, aiding or abetting another to do the act is not criminal either. This result finds support in the federal criminal law of principal and accessory.[1] Therefore, one charged with counselling, aiding and abetting has available to him many of the same substantive defenses as one charges directly with the principal offense.

1. Aiding and abetting an innocent act is not a crime. Shuttlesworth v. City of Birmingham, 373 U.S. 262 (1963).

10. Hindering Administration of the Act

¶ 2626. Hindering or Interfering With the Administration of the Act

Section 12(a), in its present form, makes liable to conviction:

> "[A] ny person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto . . ."

The 1948 Act provision, which has been carried forward into the Military Selective Service Act of 1967, substantially re-enacted the corresponding provision of the 1940 Act, § 11. However, the words "or otherwise" were added, in an almost unexplained[1] and potentially quite significant broadening of the scope of the section. The 1948 Act also added the words "or attempt to do so."

Apparently the addition of the words "or otherwise" as a result of the Fifth Circuit's decision in *Bagley v. United States,*[2] decided under the 1940 Act. Bagley had made public statements, while in a drunken condition, that he had torn up his Classification Questionnaire and would tear up the next one they sent him, that he hoped Hitler would win the war, and that he was going to do some physical harm--vaguely defined--to a board member. The court engaged in an extensive discussion of the evidence and held that Bagley's conduct did not amount to hindrance or interference by force or violence. The court went on to say that the words "force or violence" were designedly included in the statute so that the passions and prejudices attendant upon the conduct of a major war would not lead to prosecutions motivated by a partisan spirit of oppression.[3]

And then in 1948, the Congress added "or otherwise," as noted in the text above.

1. *See* ¶ 2601 n. 1 *supra.*
2. 136 F.2d 567 (CA5 1943). ¶ 25 *supra.*
3. 136 F.2d at 569.

¶ 2627. Elements of the Offense

The element of intent must be proven, though it is not in the statute, and it will be discussed below.[1] The second element is a "hindering" and "interfering" or an "attempt to do so in any way." This hindering interfering or attempt may be by force "or violence or otherwise." The thing which must be shown to have been interfered with is the administration of the act.

The element of intent in this offense is of vital importance. For example, if a registrant beats up a board member over a personal grudge, and the board member is prevented from serving for a time, that would be an interference with the administration of the Act. However, the beating would not be punishable as an interference but only as a battery under state law, because the registrant's intent was to deal with a personal grudge and not to hamper the board member in his capacity as such.[2] In short, the intent required is the specific intent to interfere, so that only a beating with the intent of intimidating the board member in the exercise of his duty or incapacitating him from performing his duty would be punishable under the Selective Service Act.

The degree of hindrance or interference is an open question. Clearly, attempts to intimidate board

1. *See also* the discussions of intent at ¶¶ 2404, 2427, 2452, 2477, 2502 *supra.*
2. Chambers v. United States, 391 F'2d 455, 1 SSLR 3023 (CA5 1968) (defendant beat up board member; court questioned whether required intent to hinder was present or whether a personal quarrel was at the root of the controversy). *See* Helton v. United States, 143 F.2d 933 (CA6), *cert denied*, 323 U.S. 765 (1944) (recognizing need for connection between assault and assaulted persons duties).

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members or officials are within this class, but more recondite interpretations of the law are invited by virtue of the term "in any way." This term may, unless given a narrow reading, render the statute unconstitutionally vague and broad, at least as applied to speech, for the first amendment protects the speaker even though his speech interferes with the functioning of government, the questions being one of degree.[3]

This discussion is related to that of the term "or otherwise," in the clause dealing with the means by which the offense may be committed. Since the prosecutorial agencies of government have construed the term "or otherwise" to embrace speech,[4] its presence may be another reason for claiming the statute to be constitutionally infirm at least in particular applications.

In short, the section admits of the broadest possible reading, and the case law thus far must be imaginatively used to limit its possible application.[5]

In dealing with a prosecution under the section in which speech is involved, the *Bond* case, discussed above, is helpful. First, it may be said that some conduct described as an "attempt" to hinder maybe precluded from prosecution by virtue of the *Bond* holding, entirely aside from the *fact* that an attempt in criminal law contemplates more than mere preparation. The *Bagley* case, although the statute may have undercut some of its reasoning, also lays down guidelines for construing the statute narrowly to avoid constitutional doubts when an inchoate crime is sought to be prosecuted. Finally, it may be argued that some conduct which arguably amounts to interference, such as a sit-in at a local board, should be excluded by judicial interpretation, from the reach of § 12(a) and left to state tresspass laws, which generally carry only misdemeanor penalties. At the least, prosecutorial discretion should be invoked to preclude such use of § 12(a) when no real federal interest is infringed.

3. *See* Edwards v. South Carolina, 372 U.S. 229 (1963); Schneider v. Irvington, 308 U.S. 147 (1939).

4. *See* the indictment in United States v. Coffin, *et al.*, No. Cr. 68-1-F (D. Mass.), in which speeches by the defendants are among the overt acts listed.

5. The language of Bagley, *supra* ¶ 2626 n. 2, provides a basis for arguing that the section as amended is unduly broad and vague. A detailed discussion of vagueness and overbreadth in statutes affecting speech is outside the scope of the *Manual*. *See generally* Comment, 54 Calif. L. Rev. 132, 147-57 (1966).

¶ 2628. Venue

Venue should be laid in the forum in which the hindering or interfering takes place, and not in the forum in which it is alleged to have an effect. In this instance there is little justification for invoking artificial rules to permit laying venue in a forum in which the defendant has done no act, as is theoretically possible with other selective service offenses. However, there is no case law, and an argument may be made for laying venue in the jurisdiction in which the defendant's conduct resulted in hindrance or interference. The case law and the competing arguments are fully set forth at ¶¶ 2211, 2405, 2428, 2453, 2478, 2528, 2553 *supra.*

11. Conspiracy

¶ 2651. Conspiracy—Generally

Section 12 of the Act makes liable to punishment one who "conspires to commit any one or more of such offenses." The 1940 Act had proscribed conspiracy, but in language which left the scope of the conspiracy provision open to some doubt. The 1940 Act was directed at any person who

> "shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so."

Doubts were resolved in favor of a reading of "to do so" which encompassed all the offenses enumerated in the section,[1] rather exhuberant expansion of the literal language.

Congress resolved the problem by making clear in the 1948 Act that a conspiracy to commit any offense listed in § 12 is a crime.

1. Singer v. United States, 323 U.S. 338 (1945).

¶ 2652. Elements of the Offense

Conspiracy is a specific intent inchoate crime, The conspirator must specifically intend to violate the law, to bring about the prohibited result.[1] The substance of the offense is an agreement between two or

1. Keegan v. United States, 325 U.S. 478 (1945); Note, *Developments in the Law – Criminal Conspiracy*, 72 Harv. L. Rev. 920, 935 (1959). This note is definitive and well-executed.

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more persons to violate the law.[2] Unlike the general federal conspiracy statute, 18 U.S.C. § 371, no overt act is required to bring the conspiracy within the sight of the criminal prohibition. A § 12(a) conspiracy is therefore like a common law conspiracy, and the statute punishes mere agreement without requiring the prosecution to allege or to prove an overt act in furtherance of the conspiracy.[3]

The elements of a criminal conspiracy, under § 12(a) or under any criminal conspiracy statute, as analyzed in a leading work in the field, are the "act of agreement," the "party" dimension, and the "object" dimension.[4] The agreement is essential, for it is the step which takes the design out of the realm of thought by one person, which in general the criminal law cannot reach, and into the realm of what the common law has perhaps irrationally termed "action." The confederation of two persons evinces a design which goes beyond mere contemplation, and sets in train efforts toward the attainment of an objective the law forbids to be attained. This element presupposes, then, that there be at least two persons who agree to make the criminal enterprise their own and to do something to bring it about.[5] If one of two alleged conspirators has only pretended to agree, there is no conspiracy.[6] Similarly, one who merely acquieses in the conspiracy or agrees not to obstruct it is in general not a conspirator.[7]

The agreement must embrace two or more persons--the "party" dimension, and it must have as its goal the attainment of one or more objectives defined in section 12 as unlawful.[8] Conspiracy law is complex and detailed, and the reader is referred to specific works on it, as there are few selective service conspiracy cases with which to deal.

2. Note, *supra* note 1, at 925-26.
3. *Id.* at 945.
4. *Id.* at 925-35.
5. *Id.* at 945-56.
6. *Id.* at 926.
7. *Id.* at 927.
8. However, if the charge is that there was one conspiracy and the evidence shows there were two, there is a fatal variance between indictment and proof. Kotteakos v. United States, 328 U.S. 750 (1946).

¶ 2653. Venue

At common law, venue might be laid in the forum in which the conspiracy was formed or in any forum in which an overt act in furtherance of the conspiracy was done.[1] The same rule has been laid down for conspiracy charges under 18 U.S.C. § 371, but that section requires an overt act to be pleaded and proved, and therefore an overt act may be said to be an element of the offense.[2] Therefore, there is no case directly construing § 12 conspiracies and laying down venue rules respecting them. It seems highly likely, however, that courts will hold that the common law rule concerning venue applies, subject to a motion for change of venue under Rule 21(b) in order to correct a venue choice which clearly disadvantages the defense, or to a motion in which it is demonstrated that the basis for laying venue in a particular forum is unrelated to the center of gravity of the alleged conspiracy.

1. Note, *supra* ¶ 2652 n. 1, 72 Harv. L. Rev. at 975.
2. *Id.* at 975-78.

¶ 2654. Defenses—Defending on Ground of Lack of Intent

The proscribed intent is the intent to violate a specific provision of § 12(a). The discussion at ¶ 2604 *supra* is relevant here, for the *Keegan* and *Okamoto* cases discussed there were brought as conspiracy prosecutions, and the intent requirement was "borrowed" from the intent required to convict of the substantive offense of counselling evasion. The *Keegan* and *Okamoto* statements that an alleged conspiracy to counsel evasion which has the purpose of obtaining a judicial precedent for a particular proposition of law is not within the scope of § 12(a) is vitally important in draft resistance conspiracy litigation.

The continuing vitality of the *Keegan* statement, quoted at ¶ 2604 *supra* may be questioned, but if it still holds than an agreement to counsel young men to refuse induction with the purpose of raising the unconstitutionality of conscription, or the illegality of a particular war, or the unlawfulness of specific Selective Service System practices, would not be unlawful because the intent is but to bring about that which the statute requires of anyone who would obtain judicial review (and who does not wish to enter the armed forces and use habeas corpus in order to obtain it)--an intent to make a "test case."

This theory was, however, raised and rejected by the trial judge in *United States v. Coffin,* et al.[1] However, it is worthy of consideration, principally because of its unique relevance to the constricted system of judicial review which the Congress and the courts have erected around the Selective Service System. See ¶¶ 2051, 2101, 2253, 2301, 2408-10 *supra.*

1. No. Cr. 68-1-F (D. Mass.), pending on appeal in the First Circuit.

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¶ 2655. Defenses—Punishing Mere Agreement

The English and American decisions are replete with statements of how dangerous a conspiracy is. But the drafters of the federal criminal code, 18 U.S.C., still thought it best to include a requirement that there be an overt act to signal that the conspiracy was really in operation.[1] There is no such requirement in § 12(a) and the courts have held that an overt act need not be alleged or proven,[2] although if the government should allege one in the indictment it may be regarded as surplusage.[3] However, one may argue that the omission of an overt act requirement renders the statute constitutionally infirm, at least as applied to conspiracies which in execution or object comprise only speech and assembly arguable protected under the first amendment, and at least in the absence of a government determination to plead and prove overt acts.

The argument rests upon dictum in *Yates v. United States.*[4] In that case, a conspiracy under 18 U.S.C. § 371 to violate the Smith Act, relating to advocacy of violent overthrow of the government, the prosecution proved only two overt acts, meetings of the Communist Party at which nothing illegal occurred and at which some of the defendants had made speeches extolling the Soviet Union and attacking United States foreign policy. The Court held that the overt act need not itself be criminal or the consummation of the conspiracy's object, but need only tend to the accomplishment of that object. This was hornbook conspiracy law. But the Court also discussed the function of the overt act requirement, stating it to be

> "simply to manifest 'that the conspiracy is at work' . . . and is neither a project resting solely in the minds of the conspirators nor a fully completed operation no longer in existence."[5]

If the requirement of an overt act is indeed to signal that the conspiracy is no longer solely in the minds of the conspirators, then the absence of an overt act is also, by accepted constitutional doctrine, the signal that the conduct of the conspirators is not punishable consistent with the first amendment; that amendment forbids the punishment of thoughts, on the view that it is time enough to put an end to a criminal design when it breaks out into the realm of action.[6]

1. The reasons for introducing the overt act requirement are obscure, according to the editors of the Harvard Law Review. 72 Harv. L. Rev. at 946-47. *But see* text *infra* this paragraph.
2. United States v. O'Connell, 126 F.2d 807 (CA2 1942), *cert. denied* 316 U.S. 700 (1942); Singer v. United States, 323 U.S. 338 (1945), affirming 141 F.2d 262 (CA3 1943), affirming 49 F. Supp. 912 (W.D. Pa. 1943).
3. United States v. Singer, 49 F. Supp. 912 (W.D. Pa. 1943), *aff'd*, 141 F.2d 262 (CA3 1943), *aff'd*, 323 U.S. 338 (1945).
4. 354 U.S. 298 (1957).
5. 354 U.S. at 334.
6. Schnieder v. Smith, 389 U.S. 17, 25 (1967).

¶ 2656. Defenses—Establishing Lack of Concert

Conspiracy cases are difficult to defend, for the courts are thoroughly imbued with the notion that since conspiracies are generally hatched in secret, the proof of guilt must be circumstantial. Circumstantial proof can include merely evidence of concerted action, or group action directed toward a common goal. That is, A, B, C, D, and E may be seen to have signed the same statement, and A, B, C, and D to have been at a certain place together making speeches about activities unlawful under the selective service law, and A, B, C, D to have been together to another point, and so on. From that a court might easily instruct a jury that a prima facie case of conspiracy has been made out, and send the case to the jury with the implied statement that it is permissible to find the defendants guilty.[1]

This unfortunate tendency to dilute the agreement requirement has been commented upon.[2] It can be resisted only by rigorous insistance that the offense of conspiracy, under § 12(a), consists essentially of agreement, of adherence to a plan to commit one or more offenses defined in the Act. Parallel behavior, of behavior which assists the group of conspirators without amounting to adherence to their agreement, does not amount to conspiracy, although aspects of both may be evidentiary of conspiracy.[3]

In establishing lack of concert, the following steps must be kept in mind. First, the prosecution will be anxious to establish a common scheme by showing common action whenever possible. Cross-examination of government witnesses concerning this alleged common action should be directed at showing different motives or rationales of action in operation for different of the defendants. Different purposes, motives and objects of action may dispel conspiratorial inferences which would otherwise arise from parallel conduct. Tactically, it may be wise for the defendants to have different lawyers to emphasize the differences. Also, with different lawyers, each defendant will have an opportunity for cross-examination on his behalf thus forcing government witnesses to deal separately with the conduct of each defendant, at least on cross-examination.

Counsel will also want to examine the *Jencks* material with special care, see ¶ 2260 *supra*, for there is a

1. On conspiracy instructions generally, *see* Mathes & Devitt, Federal Jury Practice & Instructions ch. 25 (1965 & 1968 Supp.). *See also* Note, 72 Harv. L. Rev. 920, 978-90 (1959).
2. 72 Harv. L. Rev. at 933-35.
3. *Id.* at 925-35.

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natural tendency to embroider testimony in a conspiracy case. Experienced practitioners report that the ineluctable tendency of government witnesses, particularly professional witnesses such as FBI agents, is to add small facts and details which have a certain dramatic quality indicating that the conspiracy is at work as a group of persons with a common goal rather than being merely a bunch of individuals. For example, in one well-known case--not a selective service case--a government witness, an FBI agent, testified that one of the alleged conspirators had been standing by the roadside, and when a car driven by another conspirator came into view, the first conspirator followed it with his eyes as it went down the road. This "fact" was not in the agent's quite detailed, minute-by-minute report which he had prepared contemporaneously with the events in question and which was turned over to the defense under the Jencks Act.[4]

Finally, it will be necessary to put in affirmative evidence. The aura of mystery and secrecy which surrounds the use of the word conspiracy and the manner of its proof must be dispelled. The only way to dispel it is, in most cases, for the defendants to take the stand one by one and emphasize their differences in outlook and the individual nature of their activity. If, of course, the defendants have been shown to be members of the same organization, as in the Bund conspiracy case or as in the Smith Act trials of the 1940's and 1950's, then this may not be possible. In such a case, the defense will be different; but even if lack of concert is not principally relied upon in defense, the defendant's taking the stand will dispel much of the atmosphere of prejudice.

Defendant-witnesses in such a case should be prepared with particular rigor. Every meeting, every conversation every bit of contact between and among the alleged conspirators should be explored in preparing the defendant to testify, because being surprised on cross-examination with a forgotten incident can destroy the whole of the defendant's testimony and greatly increase the chances that the jury will find an illicit agreement.

4. Trial Transcript, p. 732, Ivanov v. United States, No. 885, October Term 1967 (No. 11, October Term, 1968), *cert. granted*, 392 U.S. (1968).

¶ 2657. Other Defenses

Other defenses, including withdrawal, termination, statute of limitations, and the proof of two conspiracies where one is pleaded, are common to selective service cases and those arising under other conspiracy laws. They are not, therefore, more than mentioned here. The reader is referred to standard works on criminal law[1] for a discussion of them.

1. An important source with which to begin is the note relied on extensively in this portion of the *Manual*, Note, *Developments in the Law – Criminal Conspiracy*, 72 Harv. L. Rev. 920 (1959).

¶¶ 2658-59. [Vacant]

¶ 2660. Procedural Advantages of Conspiracy—For the Prosecution

Conspiracy is indeed the prosecutor's darling, and is regarded as such with so great a zeal that prosecutors jump to conspiracy conclusions when charging a series of substantive offenses might solve their problems just as neatly. The procedural advantages are principally in the fields of joinder, evidence, and venue.

First, regarding joinder, a conspiracy indictment obviously permits the pleader to join in the conspiracy count of the indictment all of the defendants whom he wished to join, and he will not generally be open to a motion to sever out one or more of those thus joined. Next, with the conspiracy count as an umbrella, the pleader can join a large number of substantive counts involving one or more defendants and unindicted co-conspirators. This entire package of an indictment then permits the widest latitude in proof at trial, giving the prosecution the possibility of cumulating evidence of guilt in a way that the rules on joinder would protect against were it not for the presence of the conspiracy count.[1] To meet this procedural advantage and to combat it, the defense has few devices. It may be argued that the substantive offenses should be severed from the conspiracy count under Federal Rule of Criminal Procedure 14, relating to prejudicial

1. *See* Panel Discussion, *The Problems of Long Criminal Trials*, 34 F.R.D. 155, 181-88 (remarks of Edward Bennett Williams, Esq.); United States v. Agueci, 310 F.2d 817 (CA2 1962). The reason for the joinder advantage lies in the language of F.R.Crim.P. 8, with its "common scheme" test for joinder of offenses and defendants.

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joinder. If the conspiracy is alleged or can be shown to have had manifestations in more than one judicial district, then a motion under Rule 21(b), see ¶ 2211 *supra*, should be made, taking advantage of the provision of the rule expressly permitting a case to be carved up for transfer to different forums.

Second, it is the rule that acts and declarations of co-conspirators are admissible as against one another thus driving a large hole in the hearsay rule.[2] The government must first prove an agreement prima facie, but some judges will permit this proof to be adduced after the evidence of the acts and declarations has come in, and then instruct the jury as to how they are to regard the evidence which has come in subject to being "connected up." This problem is especially acute when the declarations of unindicted co-conspirators who may by the time of trial be government witnesses are introduced under the conspiracy hearsay exception. The rule is subject, of course, to the limit that the acts or declarations must have been in furtherance of the conspiracy, and that therefore they must have been made at a time when the conspiracy was still in existence.[3]

The venue of a conspiracy has been discussed above, ¶ 2654 *supra*, and it should be clear from that discussion what advantages the prosecution has from the wide choice of venue available to it.

2. The authorities cited in the preceding sections deal with this problem. A more eloquent statement of the problem is found in Darrow, The Story of My Life 64 (1932).

3. *See* Note, 72 Harv. L. Rev. at 983-90. The limits upon the use of such testimony are also set by Bruton v. United States, 391 U.S. 123 (1968), with its prohibition on the use of a codefendant's admissions.

¶ 2661. Procedural Advantages for the Defense

Just as a conspiracy case may be more difficult to defend becuase of the myriad ramifications which the evidence may take, so the defense may be assisted by virtue of the wide latitude which it has in meeting the prosecutions charge. Conspiracy is a specific intent crime. A usual means of defending a conspiracy case, when the case has political overtones, is to focus upon the defendant's political intention as negating the idea of a principal purpose to violate the law. The defendant as witness in such a case is permitted, under the ruberic of testimony as to his intent, to introduce the social and political motivation of his conduct and put his behavior in a context which may impress the trier of fact with his importance to the contemporary political dialogue.[1] That is, the defense is permitted to go much further than in the ordinary criminal case in discussing the politics and policies which underlay the defendant's conduct.

1. This was the case in Keegan v. United States, 325 U.S. 478 (1945).

¶ 2662. Special Problems of Pleading

It is hornbook law that a conspiracy may be pleaded more loosely than a substantive offense, a rule having its basis in the inchoate character of conspiracy.[1] That is, a conspiracy, resting principally in the act of agreement, is necessarily less definite than a substantive crime already completed and describable by physical manifestations, such as tearing up a draft card or not stepping forward when one's name is called at the AFEES. It has been recognized, however, that this rule does not exempt the prosecution altogether from its obligation to plead clearly and concisely.[2] Unfortunately, the tendency to plead in the words of the statute, a device discussed at ¶ 2202 *supra*, is at its worst in conspiracy indictments. And if, as in *United States v. Coffin*,[3] the conspiracy is alleged to encompass a number of specific substantive offenses under § 12(a), all of the vagueness and overbreadth problems in the statute and in the pleading of substantive offenses under it are compounded. As an example, consider a hypothetical prosecution for hindering and interfering by beating up a draft board official. The indictment will describe the conduct in general terms, and will then allege that it amounted to hindering and interfering. Consider, by contrast, hypothetical indictment for conspiracy to hinder and interfere by beating up draft board officials, convincing registrants to turn in draft cards, and convincing registrants to refuse service. Leaving aside whether a conspiracy to do some of these things is itself an offense,[4] the typical pleading concerning them will be formidable. But as one of the parts of the conspiracy, the indictment will usually allege that the defendants conspired to "hinder and interfere in any way, by force or violence or otherwise" with the administration of the Act. This allegation is as vague

1. United States v. Devine's Milk Laboratories, 179 F. Supp. 799 (D. Mass. 1960) (stating rule and citing authorities).

2. *Id.*

3. No. Cr. 68-1-F (D. Mass.), pending on appeal in the First Circuit.

4. *See* the discussion of the possession requirement at ¶¶ 2776-78 *infra*.

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as the statutory section it paraphrases, and even more so. The statute uses the term "in any way" to reach conduct not readily classifiable on an a priori basis. But when the term is used in an allegation of an indictment for conspiracy, it carries the connotation that the defendants planned to "stop at nothing" in their interference with the administration of the Act, and thereby imports a basis for proof at trial of alleged acts and agreements far beyond the scope of the more specific allegations of the indictment. The task of the defense, therefore, is to seek to narrow the charge by motions to dismiss and by requests for bills of particulars, and by this means to keep the case within manageable bounds. See ¶¶ 2202-03 *supra.*

Because of the tendency to plead in the words of the statute, a conspiracy indictment is laden with the problems of breadth and vagueness which infect the statute itself. And it is a rule of criminal pleading, last set out by the Supreme Court in the *Johnson* case, that when a conspiracy count contains an allegation, as a principal part of the conspiracy, which charges that conduct protected by the constitution is criminal, the entire count is subject to a motion to dismiss[5] or at the very minimum to limit the government's proof.[6] The latter solution, however, falls afoul of another rule: that the indictment returned by the grand jury may not be amended, save on motion by the defense to strike matter which is merely surplusage.[7]

5. United States v. Johnson, 383 U.S. 169 (1966).

6. Limiting the government's proof as a means of curing a pleading defect was approved by the Fifth Circuit as a means of dealing with a duplicitous indictment in United States v. Goodman, 285 F.2d 378 (CA5 1960).

7. *Ex parte* Bain, 121 U.S. 1 (1887). *See* ¶¶ 2202-03 *supra.*

¶ 2663. The Defendant as Witness

The defendant-witness in a conspiracy case, in addition to being free to discuss aspects of his life and of his views which bear upon his credibility and his character, is also free to range as far as the indictment in testifying about matters in issue in the case. Because conspiracy cases appear most often in this field to involve political opposition to the draft or to war, the defendant's freedom permits him an opportunity to discuss the origin and nature of his own views, and to point up the realtionship of those views to his conduct. The preparation of the defendant to testify in a conspiracy case is therefore, difficult, for he must be free to meet hostile cross-examination on every issue he decided to raise, and to be explicit in delimiting the conduct which his views permit or require him to engage in. He is likely to meet in cross-examination every speech he has made which has been publicly recorded, every public act of his, and many aspects of his alleged co-conspirators' conduct as well.

E. Particular Offenses — Section 12(b)

¶ 2701. Particular Offenses—§ 12(b)

Section 12(b) was added in 1948, and has no precursor in prior acts. It was only briefly described in the legislative history, and referred to as a "false use" provision.[1] This reference is useful in describing the ambit of § 12(b)'s prohibitions for it may assist in defining their purpose and intent.[2] Section 12(b)(3) was amended in 1965 to add a prohibition on the mutilation and destruction of "draft cards." ¶ 2751 *infra.*

1. H.R. Rep. No. 2438, 80th Cong., 2d Sess. 50 (1948); S. Rep. No. 1268, 80th Cong., 2d Sess. 20 (1948). Both reports are quoted and discussed in Dranitzke, *Possession of Registration Certificates and Notices of Classification by Selective Service Registrants,* 1 SSLR 4029, 4039 n. 79 (1968).

2. *See* Dranitzke, *supra* note 1, at 4039.

1. The "Fraud" Offenses

¶ 2702. The Fraud Provisions of § 12(b)(1), (2), (3), (4), and (5)

This portion of the *Manual* discusses first the provisions which on their face deal with "fraud" and the fraudulent issuance, transfer and use of "draft cards." These provisions have been little used, if the dearth of reported authority is any guide. Therefore, the principles which govern decision in cases arising under these provisions must be sought largely from analogous fields.

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¶ 2703. Elements of the Offenses, Generally

Common to all these subsections is a prohibition on use in prescribed ways of "any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title, or rules of regulations promulgated hereunder." Thus, the first element of any offense charged under these provisions is proof that the subject matter of the indictment is a "certificate." As a practical matter, a "certificate" includes those enumerated and a notice of classification, no others having been prescribed by statute or regulation. A certificate means a form filled out and signed by an official of the system, it having been held that a blank form is not a certificate and may not be the subject of prosecution for possession or forging.[1]

1. United States v. Naughten, 195 F. Supp. 157 (N.D. Calif. 1961). *Cf.* United States v. Turner, 246 F.2d 228 (CA2 1957), in which the court held that a draft card stolen from a local board office after a board member's signature had been affixed but before the name of a registrant or any other information had been entered on it was a "certificate" within the meaning of the Act. Query, whether such an endorsement in blank is legal. For a discussion of "issued pursuant to" the Act and regulations, *see* ¶ 2752 *infra.*

¶ 2704. Section 12(b)(1)

Section 12(b)(1) prohibits knowing transfer or delivery of a certificate to another for the purpose of aiding or abetting the making of any false identification or representation. It therefore covers that most common of offenses, the transfer of a draft card to another to demonstrate he is of legal age to buy a beer.

It will be noted that the crime is fastened upon the transferor, and that it must be proven that he had the specific intention to aid another to make a false identification or representation. This specific intent is difficult to prove, as there will be few if any provable overt acts from which it can be inferred.[1] See ¶ 2709 *infra,* as to intent.

1. *See* United States v. Turner, 246 F.2d 228 (CA2 1947), holding that the proscribed intent under § 12(b)(2) includes "any" purpose of false identification or representation, and not merely an intent to evade military service or to interfere with the national security.

¶ 2705. Section 12(b)(2)

Section 12(b)(2) is the complementary section to § 12(b)(1), and punishes the transferee of a certificate intended for use in false identification. In this case, the transferor's intention is irrelevant; if the transferee has the certificate with the intention of using it for false identification, he may be found guilty. It also appears to be irrelevant that he may have obtained it for innocent purpose, if thereafter he forms the intention to use it for the prohibited purpose.[1] See ¶ 2709 *infra* as to intent.

1. *See* United States v. Turner, *supra* ¶ 2704 n. 1.

¶ 2706. Section 12(b)(3), Except Mutilation

Mutilation and destruction are discussed at ¶¶ 2751-62 *infra.* This section prohibits forgery, alteration or changing of a certificate, or any notation "duly and validly"[1] inscribed thereon. The section has reference to an *issued* certificate, and not a blank form which the defendant has filled in and is using.[2] See ¶ 2709 *infra* as to intent.

1. There has been no judicial construction of the terms "duly and validly." Whether or not these terms might be construed to require that the forged or altered notation have been made in conformity with the regulations is therefore open to argument. The argument in favor of such a reading of "duly and validly" in a closely related context is made at ¶ 2752 *infra.* The argument in opposition to such a reading would rest upon the defendant's plain intent to commit a forgery. *See* ¶ 2556 *supra,* for a discussion of the preclusive effect of an evil state of mind upon permissible defenses to prosecution.

2. *See* ¶ 2703 n. 1 *supra.*

¶ 2707. Section 12(b)(4)

Section 12(b)(4) proscribes the making of a likeness of a certificate "or any colorable imitation thereof," with the specific intention that the certificate thus made be used for false identification or representa-

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tion. In such a case there will generally be overt acts from which the defendant's intent may be inferred. If, for example, he has made up a quantity of copies and is passing them out and the circumstances suggest that the copies are suitable for false identification, then his intent may be held established prima facie, subject to his rebutting with his or other testimony.[1] See ¶ 2709 *infra,* as to intent.

1. Intent may be inferred from all surrounding circumstances. United States v. Weiss, 162 F.2d 447 (CA2), *cert. denied,* 332 U.S. 767 (1947).

¶ 2708. Section 12(b)(5)

Section 12(b)(5) proscribes the possession of a certificate purporting to be a certificate issued under the Act or regulations, which one knows to be falsely made, reproduced, forged, counterfeited or altered. This offense also presents difficult problems of proof for the prosecution. First, the certificate must "purport" to have been issued under the Act, which requires that it either bear resemblance to a certificate of the type issued under the Act, or perhaps also that it state that it is such a certificate. Second, the defendant must be shown to know that the certificate is false in the manner specified in the Act. If he believes it to be a real certificate, then he is not guilty of a § 12(b)(5) violation, though he may be reachable under § 12(b)(2), if the government can establish his specific intent to use the certificate for false identification. Of course, typically he will be charged with only one offense, and a variance between an indictment which charged under § 12(b)(5) and proof under § 12(b)(2) would appear to be prejudicial.[1] See ¶ 2709 *infra,* as to intent.

1. *See* Stirone v. United States, 361 U.S. 212 (1960). Due to the difficulty of establishing the specific intent under § 12(b)(5). the government would be more likely to charge under § 12(b)(2), in part to take advantage of the presumption discussed at ¶ 2709 *infra.*

¶ 2709. The Presumption of Intent

Section 12(b) also provides:

> "Whenever on trial for a violation of this subsection the defendant is shown to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains his possession to the satisfaction of the jury."

The effect of this presumption is to shift the burden of going forward with the evidence to the defendant, and to authorize the jury to convict him under §§ 12(b)(2) or 12(b)(4), although not under the other subsections, which do not deal with possession of the certificate not issued to oneself. This evidentiary presumption has not been the subject of authoritative judicial interpretation, but the rather similar presumption in the narcotics statutes provides a guide to its meaning,[1] and recent Supreme Court decisions permit one to gauge its constitutionality.[2]

A statutory presumption which shifts the burden of going forward to a defendant will be upheld if there is a rational connection between the base fact (here possession of certificates not duly issued to oneself) and the fact which may be inferred therefrom (here the proscribed intent).[3] The presumption appears to be reasonable under that test.

1. Under 21 U.S.C. § 174, possession of narcotics gives rise to a presumption of illegal importation and of the defendant's knowledge thereof, unless the defendant explains his possession to the satisfaction of the jury. *See* Rodella v. United States, 286 F.2d 306 (CA9 1960); United States v. Moe Liss, 105 F.2d 144 (CA2 1939); United States v. Peebles, 377 F.2d 205 (CA2 1967) (gives approved jury instruction on the presumption and may be useful in drafting an instruction on that score).

2. United States v. Romano, 382 U.S. 136 (1965), and cases cited.

3. *Id.*

¶ 2710. Venue

The venue of prosecutions under §§ 12(b)(1)-(5) should not pose difficulty, as it would be laid in the district wherein the acts described were committed. There do not appear to be any special problems of venue which would raise technical difficulties. On venue generally, see ¶¶ 2211, 2405, 2428, 2453, 2478, 2528 *supra.*

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¶ 2711. Defenses

Most prosecutions under section 12(b) will founder, if they are successfully resisted, upon proof of the defendant's intent. The importance of intent, and the presumption discussed at ¶ 2709, will probably require that the defendant testify concerning his intent.

Defenses concerning the illegality of the selective service process, or of requiring that these certificates be carried, will probably not be entertained, because of the rule of *Dennis v. United States*[1] that such defenses are not available when the defendant, instead of making his objection to compliance with the law clear and open and the subject of litigation in that manner, decides to appear to comply with the law by fraudulent conduct. See ¶¶ 2307, 2556 *supra*.

1. 384 U.S. 855 (1966), discussed at ¶ 2556 *supra*.

¶ 2712. Special Problems in the Pleading of Fraud

Fraud, like falsity, must be pleaded with particularity.[1] The government's indictment should be scrutinized, particularly in forgery and alteration and false reproduction cases, to make sure that the offense is spelled out in detail, including the alleged forgery or alteration of the manner of reproduction of the false copies. See ¶ 2202 *supra*.

1. *E.g.*, Yuen Boo Ming v. United States, 103 F.2d 355 (CA9 1939).

2. *Mutilation or Destruction of Certificates*

¶ 2751. Section 12(b)(3)––Mutilation and Destruction

In 1965, in the wake of public draft card burnings, the Congress hurriedly drafted and passed a statute prohibiting knowing mutilation or knowing destruction of certificates issued under the Act.[1] The Supreme Court upheld the constitutionality of this provision on its face and as applied to the defendant in that case in *United States v. O'Brien.*[2]

1. The legislative history is set out in O'Brien v. United States, 376 F.2d 538 (CA1 1967), *rev'd*, 391 U.S. 367 (1968).
2. 391 U.S. 367, 1 SSLR 3029(1968).

¶ 2752. Elements of the Offense

The elements are that of intent––"knowingly," the act––mutilation or destruction, and proof that the certificate was issued under the Act and regulations. Each of these elements may give rise to considerable controversy.

The element of intent poses difficult problems, for in *O'Brien* the Court used "knowingly" and "wilfully" interchangably, and the term "wilfully" has been the subject of extensive judicial consideration. On the one extreme, it has been held to consist of the most evil and wicked state of mind the law can conjure with: "evil motive and want of justification."[1] At another extreme, it has been interpreted to mean only that the defendant was aware of what he was doing when he mutilated or destroyed the certificate, *i.e.*, that he intended to do the act of tearing or burning or cutting or whatever.[2] It is to the defense advantage to broaden the definition of intent, and to the prosecution's advantage to narrow it. If "wilfulness" be taken to mean evil motive and want of justification, the defendant might be permitted to prove that he did not believe his certificate to have been validly issued, and a good faith belief of that character resting upon sound advice might, it could be argued, excuse his conduct and cause the prosecution to founder upon proof of intent.[3] The controversy has not been resolved at this time, and it must suffice only to describe it. Issues of intent are raised at trial by means of rulings on evidence and on proposed jury instructions.[4]

1. Spies v. United States, 317 U.S. 492, 498 (1943).
2. *E.g.*, Cal. Pen. Code § 7.
3. *See* United States v. Pechenik, 236 F.2d 844 (CA3 1956); Spies v. United States, *supra* note 1; Screws v. United States, 325 U.S. 91, 101 (1945).
4. An approved instruction is set out in United States v. Rabb, 394 F.2d 230, 1 SSLR 3164 (CA3 1968). *See also* Mathes & Devitt, Federal Jury Practice & Instructions §§ 13.12-13.13 (1965 & 1968 Supp.).

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The second element, that of destruction or mutilation, raises fewer difficulties. However, if the card is not completely destroyed, there may arise a discussion as to the meaning of mutilation. In a recent unreported case, the defendant had torn his registration certificate into four pieces, and given the pieces to an FBI agent. The agent fitted them back together and they formed the entire certificate. It might be argued in such a case that there was no mutilation, because nothing has been subtracted from the certificate, and it was still valuable for fulfilling its intended purposes.[5] This argument, resting on a common sense view of the term "mutilation," also has support in the *O'Brien* case and in the statute. The words "knowingly destroys, knowingly mutilates" appear in § 12(b)(3) immediately after the words "forges, alters," and before the words "or in any manner changes any such certificate or any notation duly and validly inscribed thereon." The principle of *noscitur a sociis*[6] would dictate that the words in the offense-definition section be defined to have related meanings and to protect related government interests. That is, the various offense-definitions in § 12(b)(3) should be seen as protecting related interests. "Forgery" and "alteration" describe conduct which changes the wording of the certificate so that it no longer accurately reflects the System's record of the registrant; by this means, the record-keeping function of the certificate is impaired or destroyed. That mutilation and destruction must be seen as meaning something similar is testified by *O'Brien*, in which the Court said, in describing the reasons why the statute was valid as applied to *O'Brien:*

"Further, a mutilated certificate might itself be used for deceptive purposes."[7]

This reference is in the midst of a discussion also important here. The court, enumerating the reasons for upholding the card-mutilation and card-destruction ban as applied to O'Brien, who totally destroyed his registration certificate, emphasized the many functions of the System which might be hampered by registrants whose cards are totally destroyed. The Court said:

> "The gravamen of the offense described by the statute is the deliberate rendering of certificates unavailable for the various purposes which they may serve. Whether registrants keep their certificates in their personal possession at all times, as required by the regulations is of no concern under the 1965 amendment, so long as they do not *mutilate or destroy the certificates so as to render them unavailable.*"[8]

The clear meaning of this passage is that conduct with respect to a certificate which did not impair its record-keeping and other functions is not an offense. The fate of this argument at the hands of the courts is unsettled, but it finds support as well in the first amendment argument which was involved in *O'Brien.* O'Brien, the Court held, could be found guilty consistent with the first amendment despite the admittedly communicative character of his conduct because he had infringed a valid interest of the Selective Service System. But if the defendant's conduct infringes no valid interest of the System, there is nothing to "balance" against the constitutional interest in free expression.[9]

Also, the statute requires that the certificate have been issued under the Act. This provision may mean no more than that some local board somewhere have been its proximate source. But the scant authority suggests a broader reading of the statute, one which requires that it have been "validly" issued. For example, if the piece of paper destroyed by the defendant is a blank form, it would not be a certificate issued under the Act and regulations.[10] If a local board in Oregon issued a certificate to a California registrant, he should not be required on pain of a felony conviction to keep it free from mutilation or destruction.[11] It was held in *United States v. Hertlein*[12] that if a local board issues a notice of classification which it has no jurisdiction under the regulation to issue, the registrant may not be prosecuted for failure to possess that notice. The *Hertlein* case can be of importance in a card-destroying prosecution, for it suggests the conclusion that if a local board issues a notice of classification which it has no jurisdiction to issue, then a registrant may not be prosecuted for destroying or mutilating it. And since *Estep v. United States,* it has been clear that all judicially cognizable board errors are "jurisdictional" in nature.[13] That is, a court always reviews selective service decisions as on collateral attack, and the inquiry is whether the board's conduct deprived it of jurisdiction over the registrant. Board action in violation of procedural regulations deprives it of jurisdiction, and board classification action without basis in fact is similarly jurisdictional in character.[14] That is, if a board classifies a registrant I-A after he has requested and proved his eligibility for a IV-D classification, and if the

5. A requested instruction from Black's Law Dictionary was refused in that case. The instruction sought to give the jury the following definition of mutilation: "As applied to written documents, such as wills, court records, and the like, this term means rendering the document imperfect by the *subtraction from it of some essential part. . . .*" Black, Law Dictionary 1172 (4th ed. 1951) (emphasis supplied).

6. Black, Law Dictionary 1209 (4th ed, 1951), meaning "It is known from its associates. . . . The meaning of a word is or may be known from the accompanying words."

7. 391 U.S. at 380, 1 SSLR at 3032.

8. 391 U.S. at 381, 1 SSLR at 3032 (emphasis added).

9. The discussion of how to strike the balance appears at 391 U.S. at 376, 1 SSLR at 3031. The Court requires that the governmental interest, must be paramount, strong, cogent or of some similar degree of importance.

10. United States v. Naughten, 195 F. Supp. 157 (N.D. Calif. 1961). *Cf.* United States v. Turner, 246 F.2d 228 (CA2 1957).

11. *Cf.* Estep v. United States, 327 U.S. 114, 120 (1946).

12. 143 F. Supp. 742, 746 (E.D. Wisc. 1956).

13. 327 U.S. 114 (1946); Sunal v. Large, 332 U.S. 174, 177 (1947).

14. *Estep*, 327 U.S. at 122-23.

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board had no basis in fact for classifying the registrant, he ought not under the *Hertlein* rationale, to be indictable for failing to carry the notice of classification free from mutilation or destruction. If this defense is recognized, it would permit the selective service file of the defendant to become the basis for defense in card-destruction cases, and would enlarge the possibility of a favorable result now that the card-burning statute has been upheld on its face.[15]

Finally, the proposition above is limited to use in a prosecution for destruction or mutilation of a notice of classification SSS Form 110. If the defendant has destroyed a registration certificate, the board's loss of jurisdiction may be urged in another way. In *United States v. Federspiel*,[16] the defendant went to the induction center and refused induction saying that he was a conscientious objector. He had never made written application for CO status. However, after his refusal, a Form 150 was supplied to him, which he filled out. His local board refused to reopen his classification, and the district court held, upon his trial for the refusal of induction, that the refusal to reopen was arbitrary, and was error of jurisdictional magnitude. The court then acquitted the defendant of refusing to submit to induction, even though the board's error had taken place after the refusal. The theory upon which the case must be seen to rest is that when a local board loses jurisdiction, it also loses the right to use the criminal courts to enforce compliance with its will, until it regains jurisdiction by bringing itself into compliance with the law. This proposition is rather startling in its breadth, and rests upon very little support in the case law.[17] But as a restatement of "clean hands" theory in a novel setting, it is worth advancing, given the particularly severe penalties attached to a selective service violation.

15. Moreover, if *valid* issuance is an element of the offense, it ought to be pleaded, *see* ¶ 2202 *supra*, and proved, *see* ¶ 2404 *supra*, by the government.

16. 1 SSLR 3042 (N.D. Ohio 1968).

17. It also finds support in United States v. Stafford, 389 F.2d 215, 1 SSLR 3040 (CA2 1968). In *Stafford*, the defendant took a letter claiming CO status with him to his local board and then to the induction center (no one having been at the local board) on the morning set for his induction. He refused to submit to induction. The local board subsequently met and denied his claim to conscientious objection. The court of appeals remanded for a determination as to whether the board denied the CO claim upon the improper ground that the defendant made his claim only after he became an offender. In *Stafford*, there is no doubt that the induction order was *valid when issued*. But the board lost jurisdiction to exact compliance with the order and did not regain it until it began to comply with the law.

¶ 2753. Venue

Venue of a card-destroying prosecution is laid in the district in which the act of mutilation or destruction took place. See ¶¶ 2211, 2405, 2428 *supra*.

¶ 2762. Special Problems of Pleading

The standard form of indictment for card-destroying cases as in use by United States Attorneys at this writing, alleges that on or about a certain day, with the ------ district of ------, the defendant "knowingly and wilfully" destroyed and mutilated a certificate, "to wit, a registration certificate [notice of classification], SSS Form No. 2 [SSS Form No. 110]." issued pursuant to the Militaty Selective Service Act of 1967 and the rules and regulations made thereunder.

This indictment, or variations of it, may be challenged upon the ground that it fails to state an offense. The allegations, in the words of the statute, are so vague and general as to omit to inform the defendant of the charge he must meet. The general principles which govern an attack upon the sufficiency of an indictment are set out at ¶ 2202 *supra*. The particular sample indictment described above suffers from the following specific defects:

1. It fails to name the person to whom the certificate was issued. The Supreme Court has pointed out that mutilation or destroying someone else's card is an offense.[1] Thus, failure to name the person whose card was destroyed has two possible effects. First, it has often happened that a series of cards are destroyed all at once, by one or more persons. It could be charged that any one of those participating in such a "ceremony" was an aider and abettor in burning all the cards destroyed, and a principal in destroying one or another of them, perhaps his own. Since the rule is generally that the indictment need not specify whether the defendant is charged as an aider and abettor or as a principal, but may merely charge him as a principal and prove aiding and abetting at trial in support of the charge, the indictment in the form described would not in such a case protect the defendant against double jeopardy.[2] It would in that sense be like an indict-

1. United States v. O'Brien, 391 U.S. at 381, 1 SSLR at 3032.

2. The protection against double jeopardy is one purpose of pleading with certainty and in detail. *See* ¶ 2202 *supra*.

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ment which charged a defendant with killing "a person," without naming that person, when in fact the defendant and others had killed a number of people on the same day.[3]

Second, the failure to name the person to whom the certificate was issued fails to apprise the defendant adequately of the charge. Can it be doubted that a court would dismiss an indictment for homicide which omitted to specify the name of the victim? There are more than 35,000,000 registrants in this country; which of the cards of which registrants did the defendant allegedly destroy? The cases holding that in a false statement prosecution, the false statements must be accurately described,[4] or that in a bankruptcy assets concealment prosecution the assets must be particularly described,[5] are in point. The indictment should equally in the card-destroying case describe specifically the corpus of the offense.

2. The indictment described does not allege that the certificates were validly issued or valid when destroyed or mutilated. A given notice of classification, for example, may be but one of a series of such notices which the System issues to a registrant from the time he is 18 until the time he is 26 or 35.[6] In addition, the validity or not of the certificate is an element of the offense in quite another way, as set forth at ¶ 2752 *supra.* The intent of the Congress was, it may be argued, not to punish persons who destroyed invalid certificates, and such an intent to have the statute protect no governmental or public interest would create serious constitutional problems for the statute on its face and as applied in particular circumstances. And the rule is:

> "the fact that the statute in question, read in light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."[7]

3. The indictment described alleges that the case arises under certain rules and regulations. It ought also to allege which rules and regulations are involved in the case, both to assist the defendant to know what the charge is to be, and to ensure that there are indeed rules and regulations in existence which justify the prosecution.[8]

4. The indictment fails to allege the manner in which the offense was committed, as by tearing, burning or cutting, and fails to allege the extent of mutilation and destruction. Such an allegation is necessary to ensure that the grand jury really considered whether the extent of mutilation justified felony prosecutions Such allegations also ensure that the defendant's conduct was sufficiently destructive of the interests of the System that it should be subject to punishment. See ¶ 2752 *supra.*

This approach to an indictment may be modified depending upon the specific allegations in a given pleading. But it marks one aspect of tenacious motions practice prior to trial, and should be considered in light of the overall strategy in a card-destroying case.

3. *See* Appendix of Forms, F.R.Crim.P., Form 2, a sample indictment for murder which names the victim.

4. *See* ¶ 2554 *supra*, for extensive citation of authority.

5. United States v. Strauss, 285 F.2d 953 (CA5 1960); White v. United States, 67 F.2d 71 (CA10 1933).

6. R1623.5 requires only that a defendant possess a "valid" notice of classification showing his "current" classification. Thus, the Selective Service System has decided that only the latest notice need be kept, and all other notices apparently serve no function.

7. United States v. Carll, 105 U.S. 611, 612-13 (1882), quoted with approval in Ornelas v. United States, 236 F.2d 392, 393 (CA9 1956).

8. *See* cases cited at ¶ 2202 *supra.*

3. Nonpossession of Cards

¶ 2776. Failure to Possess "Draft Cards"

Nonpossession of one's draft cards, including a registration certificate and a "currently valid" notice of classification, is a violation of the regulations.[1] Whether it is also a criminal offense is the subject of some controversy.[2] In discussing this subject, the legislative history of § 12(b) should be kept in mind. Prior to the 1948 Act, there was no provision comparable to § 12(b). Nonpossession cases were brought under § 12 (a)'s predecessor, § 11 of the 1940 Act, specifically under the failure to perform a duty clause of the section. With the advent of § 12(b), nonpossession cases have been brought under § 12(b)(6).[3]

1. R1617.1 (registration certificate); R1623.5 (notice of classification).

2. *See* Dranitzke, *Possession of Registration Certificates and Notices of Classification by Selective Service Registrants*, 1 SSLR 4029 (1968), upon which this portion of the *Manual* is based.

3. *Id.* at 4039.

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¶ 2777. Is It a Crime Not to Possess?

Based upon an extensive analysis of the regulations, one commentator has concluded that it is not a crime under either § 12(a) or under § 12(b) not to possess a registration certificate or notice of classification. This argument rests, for its statement concerning § 12(a), upon the premise that the regulations cannot create duties cognizable under the criminal penalties section of the Act without clearly indicating an intention to do so, through the use of language such as "duty" or "shall."[1] The possession regulations, examined in historical perspective, evince no such intention upon the part of the Selective Service System, and use words which are not indicative of an intent to create a duty the violation of which will result in conviction for felony. As to Section 12(b), this commentator concludes that § 12(b)(6), read in light of the rest of the section and in light of the evidences of Congressional intent, cannot be used for nonpossession prosecutions. Section 12(b)(6) comes at the end of what is and was designed to be a comprehensive antifraud section, and therefore must be interpreted as giving the President and the Director residual power to make antifraud regulations, not to prescribe a general possession regulation enforcable by criminal sanctions.[2]

1. Dranitzke, *supra* ¶ 2776 n. 2.
2. *Id.* at 4039.

¶ 2778. Elements of the Offense, If It Is an Offense

The element of intent, that is of knowing nonpossession, must of course be present. Accident, neglect, carelessness, and related states of mind not amounting to deliberate and premeditated nonpossession would presumably not be punishable, though there is no authority directly on point.[1]

The crux of the matter is what constitutes nonpossession. The regulation speaks of personal possession at all times, but few registrants have places in their swimming suits to carry a draft card--at least without getting it wet if they go swimming--and some registrants do not wear pajamas with pockets.[2] Common sense would dictate that the requirement be given a definition consistent with realities like swimming and sleeping, swimming suits and pajamas. In the absence of authority, it may be that analogy to the "possession" spoken of in the narcotics statutes should suffice.[3] "Possession" as defined in those statutes may be constructive as well as actual, and possession really means no more than dominion. This is at any rate the analogy which defense counsel will wish to press, for it permits a defendant whose card has been turned in to his local board, from whom he could presumably retrieve it, or whose card is being held by some third person who will give it to him when he wants it, or whose card is in a safe deposit box, to argue that he is in compliance with the law. Such a rationale does, however, omit to consider the stated justifications for the possession requirement, particularly the justification that in the event of a national emergency, or in the event that draft board records were destroyed, that registrants could be drafted off the streets by the authorities looking at their notices of classification and registration certificates.[4] This justification does seem fanciful, for it omits to consider that I-A may mean available for service after or before physical, or while awaiting personal appearance or on appeal, and therefore that the notice of classification by itself tells one little even if it recites that the defendant is in a class available for service. Therefore, the stated justifications for possession on one's person not being persuasive, dominion would on the better view be enough.

Finally, the certificate must have been "issued" under the law and regulations, and the same arguments for an expansive reading of this requirement ought to be available as those in a card destruction or mutilation prosecution. See ¶ 2752 *supra.*

1. *See* United States v. Rabb, 394 F.2d 230, 1 SSLR 3164 (CA3 1968).
2. Some registrants, it may be surmised, do not even wear pajamas.
3. *See* cases cited at ¶ 1013 *supra.*
4. United States v. O'Brien, 391 U.S. at 379, 1 SSLR at 3031-32.

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¶ 3001. Scope Note for Part IV

This part of the *Practice Manual* deals with civil actions concerning the rights and duties of selective service registrants. It is divided into two main sections: habeas corpus (IV, A) and affirmative civil litigation (IV, B). Habeas corpus, despite its recent prominence as a means of reviewing state criminal convictions,[1] is essentially a civil action to challenge the legality of any custody or restraint, and possesses most of the procedural attributes of any federal civil case. See ¶¶ 3026-3500 *infra.* The section on affirmative civil litigation (¶¶ 3501-4000) includes discussion of preinduction suits to obtain injunctive relief against an impending induction and a declaratory judgment of rights and duties, suits in the nature of mandamus to compel performance of duties, and suits to obtain declarations concerning the constitutionality of selective service statutory and regulatory provisions and administrative practices. Part IV is principally a discussion of procedural devices for asserting claims under the selective service law, rather than the law concerning the merits of such claims. Parts I, II, and III of the *Manual* have dealt extensively with the substantive selective service questions which are relevant here, and the reader is referred at many points in Part IV to the portions of Parts I, II, and III which illuminate the topics under discussion.

1. *See, e.g.,* Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

A. *Habeas Corpus*

¶ 3026. Some Background of Habeas Corpus

Habeas corpus was the only means of judicial review available to one who had been improperly inducted under the Selective Service Act of 1917.[1] See ¶ 2 *supra.* The 1917 Act made a registrant subject to military jurisdiction from the date named on his induction notice and he was, therefore, constrained to sue to secure his release from that custody. Irrespective of whether he ever reported or not, he was "in the military" by virtue of the local board mailing a notice to him to that effect.[2] The 1940 Act, and the 1948 Act (from which the present Act is principally derived), provided that a registrant is not subject to military jurisdiction until actually inducted,[3] a provision which is today found in § 12 of the Military Selective Service Act of 1967.

This change, coupled with the holding in *Estep v. United States*[4] that a registrant could challenge the legality of his classification in defense of a criminal prosecution, presents a choice of means to obtain judicial review. In addition, recent developments in the law of judicial review have provided, under some circumstances, a third way: affirmative civil litigation prior to induction. See Part IV, B *infra.* With the holding in *Estep,* the use of habeas corpus has markedly declined; the reasons for this development are suggested in the discussion at ¶ 3027 *infra.* There is no doubt, however, that habeas corpus is an effective remedy, indisputably available to a registrant wishing to challenge the legality of his induction. It remains to discuss the considerations which determine whether it is advisable to use it in a given case.

1. *See* ¶ 2 *supra.* The process is described in United States *ex rel.* Billings v. Truesdell, 321 U.S. 542 (1944). Of course, a registrant had the option of refusing to report as ordered, in which case he could be apprehended and courtmartialed as a deserter. Cases are collected in Annot., 129 A.L.R. 1171 (1940).
2. United States *ex rel.* Billings v. Truesdell, *supra* note 1.
3. *Id.*
4. 327 U.S. 114 (1946). The principal World War II decisions on judicial review were, in addition to *Estep,* Falbo v. United States, 320 U.S. 549 (1944), which established that unless a registrant went to the brink of induction, no judicial review was available, and United States *ex rel.* Billings v. Truesdell, 321 U.S. 542 (1944), which established the availability of at least some review by habeas corpus.

¶ 3027. Habeas Corpus –– Generally –– When it Should Be Used

Habeas corpus is a desirable means of review for any registrant who is willing to abide by the judgment of the court and remain in the armed forces in the event that his attempt to challenge his induction is unsuccessful. In the case of a registrant who will not under any circumstances submit to military discipline, there seems little point in seeking to challenge induction by habeas corpus. If the case is lost, and he is placed in the custody of military authorities, recalcitrance and failure to obey may result in his being court-

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martialed. Not only will court martial not assure release from the military, but the consequences of release, if one is discharged as a penalty, will almost surely be more onerous than the treatment one is likely to receive at the hands of the civil courts in a prosecution for refusal to submit to induction.

There are obviously two extremes: the client who will not under any circumstances submit to military discipline, for whom habeas corpus is simply not possible by virtue of his own decision not to submit to induction, and the client who will accept military service unreservedly if the court should hold his induction to have been lawful, for whom habeas corpus is no doubt best. Between these two, fine questions of judgment, tempered by sober reflection on the likelihood and effect of a criminal conviction in the event of refusal of induction, necessarily arise.

There are, it may be argued, advantages to habeas corpus: it is perhaps better to be a civil plaintiff than a criminal defendant; the trial judge may have a more sympathetic attitude towards a defendant who is willing to serve in the military if the issues are resolved against him; the registrant will not face a prison sentence if he loses. On the other hand, the above reasons may be argued not to have much force: an acquittal in a criminal case concludes the matter, while the government may appeal if a habeas corpus litigant is successful in the district court; some judges are more willing to call a close question in favor of a criminal defendant; a criminal defendant is in a better position to insist that the government prove particular propositions and that it should lose the case if it fails to do so; a registrant may have principled objections to submitting to induction; and finally, registrant may reasonably consider possible death or serious injury as a result of military service in determining which course to follow in challenging his classification.

The grounds for entertaining a preference for habeas corpus in particular cases have only recently come to the fore as more lawyers have become active in selective service cases, and courts have become more attentive to procedural and substantive rights of registrants in other than the conscientious objection and ministerial exemption fields. In the latter two fields, most litigants were until recently members of the Jehovah's Witness faith, who would not under any circumstances submit to induction and who would therefore be foreclosed from seeking habeas corpus. Of course, many CO'S who are not Jehovah's Witnesses will not submit to induction either, and lawyers may justly be concerned that despite the cases in which conscientious objector claims have been tendered in postinduction habeas corpus proceedings, submission to induction might be regarded as militating against the seriousness of the registrant's assertion that he cannot serve;[1] such an argument rests not so much upon the fact of submission as upon the implicit recognition that if one loses he is in the military.

An alien who wishes to litigate his liability for service without the risk of a potentially-harmful (in terms of his right to gain citizenship) criminal conviction may be well-advised to use habeas corpus, particularly given the complex character of the law governing service by aliens.[2]

While it is sometimes said that habeas corpus is disadvantageous because the registrant must remain in custody while the petition is being heard, this delay is seldom great,[3] and there are in addition arguments in favor of his being granted bail pending the outcome of the case. See ¶ 3116 *infra.*

1. The suggestion that submission to induction may militate against a CO claim is made in, *e.g.*, Comment, 54 Calif. L. Rev. 2123, 2137 (1966). In United States *ex rel.* Altieri v. Flint, 54 F. Supp. 889, (D.Conn. 1943), *aff'd,* 142 F.2d 62 (CA2 1944), the court rejected a claim that the board erred in denying a CO claim without at all mentioning the registrant's having submitted to induction. But review of a CO claim was granted and the petitioner ordered discharged in United States *ex rel.* Phillips v. Downer, 135 F.2d 521 (CA2 1943).

2. *E.g.*, Commanding Officer v. United States *ex rel.* Bumanis 207 F.2d 499 (CA6 1953).

3. *E.g.*, in *In re* Kanas, 385 F.2d 506 (CA2 1967), the registrant was inducted June 28 and ordered released by the Second Circuit on November 13, a four and one-half month delay, which however, included an appeal. In United States *ex rel.* Phillips v. Downer, *supra* note 1, the registrant was inducted March 13 and ordered released on May 7 by the Second Circuit.

¶ 3028. Outline of a Habeas Corpus Case

The discussion in this paragraph is merely a brief outline of the detailed presentation in Part IV, A. In brief, the habeas corpus litigant must go to the induction station on the day appointed for his induction. When his name is called, he must step forward. He is at that point in the armed forces. See ¶ 1127 *supra.* His attorney will have filed, or will immediately thereafter file, a petition for writ of habeas corpus. Appropriate arrangements will have been made to keep the inductee in the induction station — or at least within the jurisdiction of the court — pending the outcome of the case. The court will then rule on whether or not the inductee is "lawfully in custody," that is, whether the procedures leading up to the issuance of the order to report for induction were lawful. If the inductee wins, he is released from the military; if he loses, he is still in the military. Both the government and the inductee have the right to appeal from an adverse determination by the district court.

The discussion below retraces this process in detail, and adds comments on unusual situations such as that which may be posed by a registrant who submits to induction and does not sue immediately for release

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and that which may arise when an adjudication is sought prior to submitting to induction on a "constructive custody" theory.

Not discussed below are the special problems which arise in the use of habeas corpus to obtain discharge of persons in military service based upon allegedly illegal actions of the government after induction, such as arbitrary refusal to grant a discharge claimed under Department of Defense Directive 1300.6, reprinted in SSLR's *Statutes & Regulatory Material* section, relating to conscientious objector beliefs arising after entry into military service. Also excluded is consideration of collateral review, by habeas corpus, of court-martial convictions. These problems will be discussed in Part V of the *Practice Manual* (forthcoming).

The ensuing discussion of habeas corpus owes much to Ronald Sokol's *Handbook of Federal Habeas Corpus,*[1] an excellent summary of the law of habeas corpus and a valuable guide to the practitioner.

1. Published in 1965 by the Michie Company, the book sold at the time of publication for $10.00. It is available in any moderately well-equipped law library. For further discussion of the book, see Heyman & Tigar, Book Review, 53 Calif. L. Rev. 914 (1965). The reader without access to Sokol may find the discussion in Am. Jur. 2d, "Habeas Corpus" or that in Moore, Federal Practice (*see* Index under "Habeas Corpus") sufficient for his purposes.

1. Statutes and Rules Governing Habeas Corpus

¶ 3051. Jurisdiction –– Statutory Provisions

The habeas corpus jurisdiction of the federal courts is defined in 28 U.S.C. § 2241. The procedure for applying for the writ is set out in considerable detail in 28 U.S.C. §§ 2241-54.

The writ is available to any person who is "in custody under or by color of the authority of the United States" 28 U.S.C. § 2241(c)(1), including persons inducted into the armed forces.[1] Although the statute expressly states that "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions," 28 U.S.C. § 2241(a), the consistent course of federal practice has virtually confined habeas corpus applications to the district courts. This practice has received recognition in the Federal Rules of Appellate Procedure, which state that if application is made to a circuit judge, the case will ordinarily be transferred to the appropriate district court. F.R. App. P. 22. However, in an appropriate case a single justice of a court of appeals or of the Supreme Court, or the entire Supreme Court, has the statutory power—which may not, it has been suggested, be suspended save in violation of the constitutional prohibition on suspending the writ of habeas corpus[2]—to order a person in custody discharged. Indeed, as appears below, ¶ 3101 *infra*, there are cases in which such action might be required because a district judge will not be able to obtain jurisdiction over both the petitioner and his custodian.[3] In all the discussion below, however, it is assumed unless otherwise stated that the application is made to a district judge within the territory of his jurisdiction.

The application for the writ is usually followed by issuance, by the district judge, of an order to show cause. The person to whom the writ is issued must make a return within three days certifying the cause of the detention, and the matter is set down for hearing within five days, at which the district judge is to "dispose of the matter as law and justice require." 28 U.S.C. § 2243.

In a habeas corpus case, the standards of judicial review, and the bases upon which a court will declare an induction to have been illegal, are the same as in a criminal prosecution for refusal to submit to induction.[4] See ¶¶ 1075, 2407-10 *supra* for a discussion of these standards.

1. "Habeas corpus has also been consistently regarded by lower federal courts as the appropriate procedural vehicle for questioning the legality of an induction or enlistment into the military service." Jones v. Cunningham, 371 U.S. 236, 240 (1963). To the same effect is Witmer v. United States, 348 U.S. 375, 377 (1955); Gibson v. United States, 329 U.S. 338, 359 (1946).

2. Locks v. Commanding General, 1 SSLR 3288 (U.S.S.C. 1968) (Douglas, J., in chambers).

3. *See Ex parte* Endo, 323 U.S. 283, 304-07 (1944) (court may act if respondent is within the reach of its process; its jurisdiction is not defeated by petitioner's removal from jurisdiction after petition is filed); Ahrens v. Clark, 335 U.S. 188 (1948) (petitioner must be within territorial jurisdiction of the court at time petition is filed). The combined effect of *Ahrens* and *Endo* is to suggest that the petitioner only, and not the respondent, must be within the territorial jurisdiction of the court issuing the writ. However, the matter is apparently not settled. It is clear, however, from *Endo* and *Ahrens*, that the petitioner must be within the territorial jurisdiction of the court when the petition is filed. *See* ¶ 3101 *infra*, on the proper court in which to file the petition.

4. *See generally* Clark v. Gabriel, 392 U.S. , 1 SSLR 3220 (U.S.S.C. 1968).

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¶ 3052. Did the 1967 Amendment to the Act Do Away With Habeas Corpus?

Since 1967, judicial review in Selective Service cases has been governed by the provisions of § 10(b)(3) of the Military Selective Service Act of 1967, which provides:

> "No judicial review shall be made of the classification or processing of any registrant . . . except as a defense to a criminal prosecution instituted under section 12 of this title. . . ."

Read literally, this language would do away with habeas corpus as a means of judicial review. The Solicitor General has, however, conceded that the statute would raise serious constitutional doubts if so construed (the Constitution forbids suspension of the writ of habeas corpus),[1] and the Supreme Court has indicated that it agrees.[2]

1. Brief for the Respondents, Oestereich v. Selective Service System, 392 U.S. , 1 SSLR 3215 (U.S.S.C. 1968) (available in facsimile from SSLR).

2. Gabriel v. Clark, 392 U.S. , 1 SSLR 3220, 3221 (U.S. S.C. 1968). The lower courts had, prior to *Gabriel*, agreed that habeas corpus was available. *E.g.*, United States *ex rel.* Caputo v. Sharp, 282 F. Supp. 362, 1 SSLR 3126 (E.D. Pa. 1968).

¶ 3053. Application of Federal Rules of Civil Procedure

F.R.Civ.P. 81(a)(2) provides: "These rules are applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions." Since habeas corpus is a civil proceeding, one would expect that on all matters of procedure governed by statute, the statute controls, and that on all matters not so governed, the Federal Rules of Civil Procedure apply. This rule is easy to state, and is certainly a beginning point for analysis; however, it has proven difficult to apply.[1]

On a quick reading of the Rules, it appears that the rules on process (F.R.Civ.P. 4 and 5), the rule on computation of time (F.R.Civ.P. 6), and the rules relating to the form and construction of pleadings (including, presumably, supplemental pleadings, see ¶¶ 3111, 3177 *infra*), (F.R.Civ.P. 7-15), apply to habeas corpus proceedings. The rules concerning parties are in the main irrelevant to habeas corpus proceedings, as the consistent course of federal decision has established who may and who must be the parties plaintiff and defendant in a habeas corpus proceeding, and the statute contains provisions on this score as well. ¶ 3076-77 *infra*. However, the substitution of parties provisions of F.R.Civ.P. 21 and 25 appear to apply, and F.R. Civ.P. 25(d), relating to substitution of a successor public official clearly applies. Whether a class action might be maintained in habeas corpus is uncertain.[2] The applicability of the discovery rules to habeas corpus proceedings is discussed at ¶ 3117 *infra*.

The rules on "Trials," F.R.Civ.P. 38 through 53, appear applicable in large measure. Of course, there is no jury trial in habeas corpus, so F.R.Civ.P. 38 and 39 do not apply. However, rules 40 (assignment of actions for trial); 41 (dismissal of actions); 42 (consolidation); 43 (evidence); 44 (proof of official record) and 44.1 (determination of foreign law), and 45 (subpoenas) apparently apply, as do F.R.Civ.P. 46 (exceptions abolished) and 52 (findings by the court). The remainder of the trial rules appear to be inapplicable.

The rules on "Judgments," F.R.Civ.P. 54 through 63, are largely applicable: For example, the technical rules on the form of judgment, entry of judgment (F.R.Civ.P. 54, 55, 58), new trial (F.R.Civ.P. 59), harmless error (F.R.Civ.P. 61) and stays (F.R.Civ.P. 62) appear to apply.

The provisional remedy provisions of the Rules, principally those of F.R.Civ.P. 65, apply to habeas corpus actions and the court may under the All Writs Act, 28 U.S.C. §1615, issue any process or order in aid of its jurisdiction to preserve the status quo pending the outcome of the litigation. See ¶ 3110 *infra*.

Of course, each district court will have its own local rules on civil actions, and may have special procedures to be followed upon the filing of a petition for writ of habeas corpus. These rules should be consulted. When in doubt, the clerk of the district court (or in a large district, a deputy clerk in the civil section of the clerk's office) should be consulted.

1. Cases are collected in Note, 81 Harv. L. Rev. 1482, 1491-96 (1968).

2. In Morse v. Boswell, 289 F. Supp. 812, 1 SSLR 3261 (D. Md. 1968), the class suit for injunctive relief was treated at 113 separate petitions for habeas corpus, the court apparently being of the view that a class action for a writ of habeas corpus would not be available. In an appropriate case, however, the policy of F.R.Civ.P. 23, of avoiding multiple adjudications with the danger of conflicting results, would appear to be applicable in a habeas corpus proceeding as in any other. See Note, 81 Harv. L. Rev. 1482 (1968). There appears to be no instance of a habeas corpus class suit at common law, but one would not expect there to be, since the class suit was originally an equitable device.

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¶ 3076. Parties Plaintiff

The statute, 28 U.S.C. § 2241, extends the writ to any "prisoner" who is "in custody by color of the authority of the United States." 28 U.S.C. §2242 provides that the petition must be signed and verified "by the person for whose relief it is intended or by someone acting in his behalf," thus permitting next friend applications.

There is some question in the cases whether an alien is entitled to habeas corpus; however, it appears that any person recognized by the law for purposes of induction should be able to sue.[1]

Next friend applications are not common, but they are occasionally useful and sometimes necessary, as when the person restrained cannot be reached to sign and verify the petition. Because the federal courts have castigated "intruders" and "uninvited meddlers" for styling themselves next friends without good ground for doing so, a next friend petition should clearly state facts which will satisfy the court that the next friend's interest is appropriate and that there is good reason why the detained person did not himself sign and verify the petition.[2] The form of such an allegation is given at ¶ 3108 *infra.* Fathers[3] and wives[4] are customary "next friends" in selective service habeas corpus cases.

Whether a class suit may be maintained in habeas corpus is an open question.[5]

1. Commanding Officer v. United States *ex rel.* Bumanis, 207 F.2d 499 (CA6 1953) (Latvian national); Harisiades v. Shaughnessy, 342 U.S. 580, 586 n.9 (1952) (citing authorities).

2. United States *ex rel.* Bryant v. Houston, 273 Fed. 915, 917 (CA2 1921) (petition must set forth facts to satisfy court that next friend petition is appropriate); Wilson v. Dixon, 256 F.2d 536, 538 (CA9 1958) (castigating "intruders and uninvited meddlers").

3. United States *ex rel.* Goodman v. Roberts, 152 F.2d 841 (CA2), *cert. denied,* 328 U.S. 873 (1946); United States *ex rel.* Alves v. Geesen, 59 F. Supp. 726 (N.D.Calif. 1945).

4. Application of Greenberg, 39 F. Supp. 13 (D.N.J. 1941) United States *ex rel.* Broker v. Baird, 39 F. Supp. 392 (E.D.N.Y. 1941).

5. The argument for class suits in habeas corpus is developed in Note, 81 Harv. L. Rev. 1482 (1968), collecting the meager authority and extensively discussing the policy issues.

¶ 3077. Parties Respondent

The question of parties respondent is governed by the statute. 28 U.S.C. §2242 provides that the petition must state "the name of the person who has custody over" the petitioner or other persons in custody. 28 U.S.C. §2243 states that the writ or order to show cause which is issued in consequence of the filing of the petition, see ¶ 3112 *infra,* "shall be directed to the person having custody of the person detained." From these provisions and the cases construing them it appears that the respondent must be the person with immediate power over the detainee's freedom of movement who has the authority to produce the body of the detainee into court in response to the order to show cause, and who has the power to discharge the detainee from custody.[1] The latter requirement is generally construed in a rather artificial sense, for the immediate custodian is usually the only necessary party and he is considered to have the power to discharge the detainee from custody upon order of the court although in the normal case he could not release anybody without authorization from some superior officer.

The proper respondent in a selective service case will, therefore, usually be the commanding officer of the military installation where the detainee is located, for he has immediate control over the person of the registrant. See R̲1632.14.[2] This will in most cases be the commanding officer of the Armed Forces Examining and Entrance Station at which the detainee submits to induction. The head of the entire branch of the armed service into which the detainee is inducted may be made a party respondent, although it is not necessary to do so. Often, it will not be known in advance of induction to which service the inductee is to be assigned, so it is impossible to make the appropriate service secretary a party. Although some attorneys make a practice of naming subordinates and superiors of the AFEES commanding officer as respondents, it appears superfluous and wasteful to do so. The same may be said of making the local board a party.

It is good practice to name the respondent in his official capacity, as well as by his given name. Indeed, F.R.Civ.P. 25(d)(2) provides that a public official may be sued by his official title only, although the court may order his name to be added.

Unless there is a proper party respondent, the case may be dismissed as "moot," that is, on the ground that, given the parties before it, the court has not the power to grant the relief required. Such a dismissal

1. *See Ex parte* Endo, 323 U.S. 283 (1944); Ahrens v. Clark, 335 U.S. 188 (1948).

2. *See* United States *ex rel.* Billings v. Truesdell, 321 U.S. 542 (1944). The Commanding Officer, and not the United States, is the proper party respondent, and in a case in which the district court had granted relief to the petitioner, and a notice of appeal was timely filed by the United States but not by or on behalf of the Commanding Officer, the appeal was dismissed. United States *ex rel.* Bumanis v. Commanding Officer, 207 F.2d 499 (CA6 1953). The result today would likely not be dismissal but relief under F.R.Civ. P. 21.

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may, however, usually be averted, for leave of court may be obtained to add the proper party: the statute permits the petition to be amended and supplemented as provided in the Federal Rules of Civil Procedure, 28 U.S.C. §2242; and F.R.Civ.P. 21 permits adding or dropping of parties "on motion of any party or of [the court's] own initiative at any stage of the action and on such terms as are just."

Lastly, the respondent must generally be within the territorial jurisdiction of the court in which the petition is filed. This rule has principal application in deciding in which court to file the petition, and is therefore discussed at ¶3101 *infra*. However, when there is a choice of permissible respondents, one in and one without the court's jurisdiction, the former should always be joined as a party.

3. Pleading and Service

¶3101. Where to File the Petition — District Judge, Circuit Judge, Supreme Court Justice

In the ordinary course, the petition for habeas corpus will be filed in the judicial district in which the induction station is located. The district court for that district will, upon the day appointed for induction, have within its jurisdiction both the custodian and the detainee. Both should, in general be within the court's territorial jurisdiction at the time the petition is filed.[1] If the detainee is later moved outside the court's jurisdiction, this action will probably not moot the case or require a transfer of forum.[2] It will, however, give counsel some worry about being able to consult with his client, and provisional remedy (see ¶3110 *infra*) or informal pre-filing consultation with appropriate officials (see ¶3104 *infra*) should be used to forestall such action.

If, however, the custodian and the detainee are in different judicial districts in the same circuit the petition may be filed with a single judge of the court of appeals for that circuit. Note that 28 U.S.C. §2241 requires that the petition be filed with a single judge, not with the court; the petition should set forth the reasons why it is not filed in district court. If the circuit judge decides the petition should be heard by a district judge, he will refer it to the proper court. F.R.App.P. 22(a). In a case in which the petitioner and his custodian are in different circuits and not in the reach of a single district court, the proper practice is to file an original petition for habeas corpus with the Supreme Court under Sup.Ct.R. 31(5) or with a single justice of the court, who may refer it to the entire Court. Sup.Ct.R. 50.[3]

Moreover, if a district judge is unavailable and a circuit judge or Supreme Court Justice is available, reason might be found for not filing the petition in the district court, particularly if some interlocutory relief is necessary to prevent mootness through movement of the petitioner or deprival of the opportunity to file the petition. After granting the interlocutory relief of ordering the body of the petitioner produced, the petition may be referred to a district judge under F.R.App.R. 22(a) and 28 U.S.C. §2241(b).

1. *See* ¶3051 *supra,* and authorities there cited.
2. *See Ex parte* Endo, 323 U.S. 283, 304-07 (1944). *Cf.* Ahrens v. Clark, 335 U.S. 188 (1948), ¶3051 n.3 *supra.*
3. There is, however, some question as to whether a single justice may entertain the writ, despite the clear language of 28 U.S. C. §2241. *See, e.g.,* Locks v. Commanding Officer, 1 SSLR 3288 (U.S.S.C. 1968) (Douglas, J., in chambers).

¶3102. When to File the Petition — The Custody Requirement as a Procedural Prerequisite and a Jurisdictional Datum

Habeas corpus lies only to test "custody;" this rule has special importance in a selective service habeas corpus case. Generally, in order for habeas corpus to be available, the detainee must be under a present restraint upon his freedom of movement, at least at the time the petition is filed.[1] Older authority and recent confused dicta may cast a momentary pall of doubt, but it is now indisputably settled that simply

1. Jones v. Cunningham, 371 U.S. 236 (1963) (parolee); Carafas v. LaVallee, 391 U.S. 234 (1968) (if petitioner is in custody when petition is filed, his unconditional release does not defeat federal jurisdiction at least when there are continuing disabilities (stigma loss of voting rights, etc.) arising by reason of his conviction for crime.

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being in the military is sufficient interference with one's liberty to support the issuance of the writ.[2] Therefore, once a registrant takes the ceremonial step forward signifying entrance into the armed forces, he is "in custody" within the meaning of 28 U.S.C. §2241 and habeas corpus lies to procure his release.

Related to, but analytically distinguishable from the §2241 requirement of "custody," is that of "ripeness." See ¶ *supra.* Prior to submission to induction, the registrant's claim of illegal System action may be considered not sufficiently ripe for adjudication; that is, a registrant may not absent exceptional circumstances, see Part IV, B *infra,* challenge the legality of his classification and induction until he either refuses to step forward for induction and defends a criminal prosecution on the ground of System illegality, or steps forward and sues for habeas corpus. This "ripeness" requirement, which is peculiar to selective service cases and arises out of policies derived from the selective service law, see ¶2454 *supra,* Part IV, B, *infra,* should not be confused with the custody requirement generally applicable in habeas corpus proceedings, which merely requires that the registrant be under some form of actual or constructive restraint. See ¶3105 *infra* for a further discussion of the distinction and its applications.

2. *See* cases cited ¶3051 n.1 *supra.* And it is clear that the restraint continues even if the detainee is made a reservist or sent home on leave. United States *ex rel.* Altieri v. Flint, 54 F. Supp. 889 (D.Conn. 1943), *aff'd,* 142 F.2d 62 (CA2 1944). *See also* cases collected in Sokol, A Handbook of Federal Habeas Corpus 24-25 n.78; *In re* Crane, ----F. Supp.---- 1 SSLR 3051, 3052 (N.D.Calif. 1968); Hammond v. Lenfest, ----F.2d----, 1 SSLR 3108, 3110 (CA2 1968).

¶3103. When to File the Petition -- Advising the Client

The registrant whose induction will be challenged by means of habeas corpus should be helped to draft a letter to take to the induction station, stating that he will submit if he is found acceptable after all his processing has been completed but that he will immediately bring suit to challenge his induction. See ¶2403 *supra.* His lawyer should also make arrangements to have a representative at the induction station. See ¶3104 *infra.*

The reasons for the client announcing his intention to litigate are those spelled out in ¶2403 *supra;* also, if the station personnel are put on notice that they are going to be sued, the possibility that they will try to move the registrant out of the jurisdiction after induction is tempered by the rather stronger possibility that to do so may be contumacious of the authority of the court. The lawyer may wish to explain this to the AFEES Commanding Officer; it should be emphasized, however, that the Commanding Officer may be more familiar with habeas proceedings than the lawyer. This fact underscores the advisability of the advance arrangements discussed in ¶3104 *infra.*

¶3104. When to File the Petition -- As a Matter of Convenience

The timing of the filing is a matter of some complication. The following is a good outline of how to proceed in most judicial districts. After the client and lawyer determine to obtain review by habeas corpus, the petition and the letter referred to in ¶3103 *supra,* should be drafted. The lawyer should contact the legal officer of the State Selective Service Headquarters to notify him of the plan to seek habeas corpus. (This may also be a good opportunity to pursue negotiations. See ¶2104 *supra.*) The lawyer should also contact the Assistant United States Attorney who generally handles selective service cases in the district. Sufficient copies of the petition should be prepared to meet the service requirements set out in ¶3107 *infra.*

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Then on induction day, the lawyer or his representative will be at the induction center to observe the induction ceremony. Prior arrangement for this can usually be made by the lawyer and the commanding officer or United States Attorney. At the moment after induction, the lawyer or representative must make a telephone call to another person, who by prior arrangement, is at the district court clerk's office. The person at the clerk's office should be told to file the petition. The person at the induction center should then serve the processing officer at the induction station, as described in ¶ 3107 *infra.* Service of the remainder of the persons listed in ¶ 3107 can then be accomplished.

Obviously, if the clerk of the district court refuses to accept the petition for filing because it is not in proper form, the entire process of obtaining habeas corpus can be made more difficult. Therefore, it is a good idea to review the petition with the clerk a day or so before filing, to iron out any problems. This course is always safest, unless counsel has handled enough cases in the district to be confident of his familiarity with peculiar local rules.

Often, an assistant United States Attorney in the district, or an officer at Selective Service headquarters will have been through a sufficient number of such proceedings to be able to guide the inexperienced practitioner.

1. The following is a description of a habeas corpus proceeding in the words of the lawyer handling the case. The case described is Lane v. Allen, Civ. No. C 69-49, 1 SSLR (N.D.Ohio 1969):

"On the morning of the induction I called Colonel Allen, the commanding officer at the induction station and told him what I was planning to do, explaining that it was impossible to file the petition to the Federal Court until after Lane was inducted but that it was important to do so as soon as possible in order that the court could act before Lane was taken out of town. Colonel Allen volunteered to call me as soon as Lane was inducted, but he said that probably would not be until 4:30 to 5 p.m. I then called the chief deputy clerk and explained the problem to him, particularly the fact that it might be that Lane would not be inducted until after the clerk's office would close at 4:45. The deputy clerk then arranged a meeting between me and Judge Green and said he would notify the district attorney's office and have them present. This meeting was held at 2:00. I took to the meeting my petition, the proposed order to show cause, and a memorandum of points and authorities. The judge agreed to sign the order to show cause in advance, delivering it to an assistant clerk, in escrow, as it were, to hold until the petition was actually filed so that she could file the order promptly thereafter and get copies of the order and petition to the marshall for service on Colonel Allen.

"At 4:05 p.m. Colonel Allen called and said that Lane had become Private First Class E-1 in the United States Army one minute and forty-five seconds earlier. Within five minutes I was at the court filing the petition and a few minutes after that the assistant clerk walked across the hall to the marshal's office, where we had already told our story and got a promise that a deputy marshal would head for the Federal Building immediately. Later I phoned the marshal's office and was told that Colonel Allen had been served at about 4:35 or 4:40.

"In our conference with the judge during the afternoon, January 21, the judge and the district attorney and I had agreed the hearing would be held at 2 p.m. on January 24. This was not written into the order to show cause, which had already been prepared, but the order itself did command the respondent to file his return to the order to show cause, answering the petition, within three days. The return was handed to me at the beginning of the court hearing on January 24, at 2 p.m.

"After Colonel Allen was served with the order to show cause Lane was directed to return home on leave and return at noon on January 24 so that Colonel Allen could bring him to the hearing. This was done. After the hearing I asked Colonel Allen if Lane was still on leave and the Colonel said that Lane was not on leave now but on active duty. However, at 5:00 he would be told that he could go home to return at 8 a.m. on Monday. He said that if Lane wanted to he could take leave on Monday using up part of the 30-day leave per year that a man accumulated while in service. I advised Lane to do so and to return to his job, not knowing how soon the ruling would come. The ruling [discharging Lane] came on Monday afternoon."

The description given above is slightly at variance with the procedure described in the text, but has the virtue of being somewhat less complicated. It may, therefore, be preferable to that described in the text, provided the appropriate arrangements can be made with the AFEES commanding officer.

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¶ 3105. Habeas Corpus Prior to Induction

The two issues—custody and ripeness—mentioned in ¶ 3102 *supra* arise most sharply when preinduction habeas corpus is sought. The question of whether and when preinduction judicial review is available is discussed fully in ¶ 3530 *infra*. It is appropriate, however, to discuss in this paragraph the question whether at any time prior to his induction a registrant is under sufficient restraint to satisfy the "custody" requirement. It is generally held that the writ does not lie to test the legality of a detention which is threatened for the future,[1] nor to test the legality of past detention, although the latter principle has been drawn into serious question by a recent decision of the Supreme Court.[2]

One might plausibly argue that receipt of an order to report for induction constitutes at least "constructive restraint" on a registrant's liberty, although courts have thus far been hesitant to accept this argument.[3] However, one court has held that a registrant who was inducted then furloughed to the Reserves to clear up some personal business (a common practice in World War II) was under sufficient restraint to support the writ,[4] and another court held that a registrant is under certain circumstances entitled to bring a writ of habeas corpus after issuance of an order to report for induction but before submitting to induction (and even before taking the preinduction physical examination).[5] The argument that one under an order to report at a future date is restrained of his liberty rests in part upon *Jones v. Cunningham,*[6] in which the Supreme Court held that a convict on parole was under sufficient restraint to fulfill the custody requirement. The court cited the parole board's control over his life, over the kinds of jobs he could take, over his freedom of movement, and so forth.[7] These restraints are rather similar to those placed upon a registrant who must report for induction upon a specified day. Indeed, it might be argued that a registrant who was I-A, and who requested and was denied a permit to depart the United States under R1621.16, would be under sufficient restraint to justify bringing habeas corpus. Moreover, the Selective Service System's channeling function, which is designed to exert control over civilian activities, may be argued to support the contention that every registrant is to some extent in custody. However, such an argument may also illustrate the essential fallacy in pushing the constructive custody rationale to encompass other than certain clearly-defined cases, such as those arising after issuance of the order to report for induction but before a registrant is actually inducted. There are several reasons for caution in pushing for relaxation of the "custody" requirement. First, even if it is held that a registrant who has not submitted to induction is not "in custody," that adjudication does not, of itself, bar preinduction relief under some other statute conferring jurisdiction on the federal courts. For example, the court might grant relief by way of injunction. See Part IV, B *infra*. Conversely, a holding that a registrant is in "custody" would not settle the jurisdictional question whether the registrant's claim is ripe for adjudication, as discussed at ¶ 2454 *supra*. And there appears to be no procedural advantage in bringing habeas corpus as opposed to some other civil proceeding to secure a pre-

1. Heflin v. United States, 358 U.S. 415 (1958). However, this rule is attenuated considerably by Peyton v. Rowe, 391 U.S. 54 (1968), in which the Court held that a prisoner in custody on two consecutive sentences could attack the validity of the second sentence, even though he had not yet begun to serve it. This result was, however, reached upon the quite practical ground that by the time the prisoner got around to beginning his second sentence, the witnesses to the wrongs he complained of at his trial would all be dead. Moreover, a second consecutive sentence may have an impact upon parole eligibility.

2. *See* Carafas v. LaVallee, 391 U.S. 234 (1958), cited and discussed at ¶ 3102 n.1 *supra*.

3. *E.g.*, McDowell v. Sacramento Local Board Group, 264 F. Supp. 492 (E.D.Calif. 1967); Lynch v. Hershey, 208 F.2d 523 (CA DC 1953), *cert. denied,* 347 U.S. 917 (1954); United States *ex rel.* Lauritsen v. Allen, 154 F.2d 959 (CA8 1946); Biron v. Collins, 145 F.2d 758 (CA5 1944); Enge v. Clark, 144 F.2d 638 (CA9 1944); Berman v. Clark, 144 F.2d 640 (CA9 1944); *In re* Herman, 56 F. Supp. 733 (N.D.Tex. 1944).

4. United States *ex rel.* Altieri v. Flint, 54 F. Supp. 889 (D. Conn. 1943), *aff'd,* 142 F.2d 62 (CA2 1944).

5. *Ex parte* Fabiani, 105 F. Supp. 139 (E.D.Pa. 1952), cited with approval, Jones v. Cunningham, 371 U.S. 236, 240 n.11 (1963). However, *Fabiani* has in latter cases been confined to its facts.

6. 371 U.S. 236 (1963), discussed extensively in Hammond v. Lenfest, ----F.2d----, 1 SSLR 3108, 3110 (CA2 1968).

7. *See* Hammond v. Lenfest *supra* note 6.

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induction test of the legality of the board's action, for the hypothesis of almost any civil action habeas corpus or otherwise is that the registrant who loses his bid for a judicial declaration of System illegality will enter or remain in military service. The disadvantages of habeas corpus when compared with other civil remedies include the uncertainty surrounding the availability of discovery. The only advantage of pursuing a claim that habeas corpus lies prior to induction is the possible psychological advantage of having the court regard the detainee as under a present restraint.

Because the principal problems arising in the preinduction use of habeas corpus are not of "custody," but of ripeness, the reader is referred at this point to Part IV, Section B, dealing with civil remedies other than habeas corpus, and particularly to ¶ 3530 *infra*. The discussion in the paragraphs which follow, unless otherwise stated, deals with the usual case of a registrant seeking habeas corpus after submitting to induction.

¶ 3106. Filing Petition After Refusal of Induction

A registrant who refuses to submit to induction and who is arrested at the induction center, or who is thereafter arrested or held in connection with a charge of refusal to submit to induction, is "in custody." However, it is a sufficient return to the writ to say that the detainee is held to answer upon a criminal charge before a court of competent jurisdiction.[1] Exceptions to this principle include an historic use of habeas corpus to test denial of bail to one accused of crime, but the remedy of such a person is now prescribed by the Bail Reform Act and in any case such a use of habeas corpus does not call for an adjudication on the merits of a claim of System illegality. See ¶ 2107 *supra*. Another exception to the rule that habeas corpus will not be used to interfere with a federal court's conduct of a case may arise from the teaching of *Dombrowski v. Pfister*[2] and its progeny, which hold that important constitutional rights, such as the freedom of speech, may require protection by use of federal judicial power to abort pending criminal cases. The considerations which would lead a court to such a result are, however, more appropriately discussed at ¶ 3530 *infra*. The following discussion is limited, unless specifically noted, to the use of federal habeas corpus to obtain the release from military custody, through outright discharge, of one claiming to have been unlawfully inducted.

1. *See* Sokol, A Handbook of Federal Habeas Corpus (1965).

2. 380 U.S. 479 (1965).

¶ 3107. Service of Process

Service of the complaint (petition) in a post-induction habeas corpus case should be made as follows:

1. A copy of the summons and complaint should be served on the Commanding Officer of the Armed Forces Examining and Entrance Station and on any other respondent. F.R.Civ.P. 4(d)(5).
2. A copy should be served upon the United States Attorney for the district in the manner set out in F.R.Civ.P. 4(d)(4), and another copy should be sent by registered or certified mail to the Attorney General of the United States, Department of Justice, Washington, D.C. 20530.
3. Since the order being attacked is that of the local board, and since the local board will not usually be a party to the action, see ¶ 3077 *supra*, a copy of the summons and complaint can be sent by registered or certified mail to the board, as provided in F.R.Civ.P. 4(d)(4).

Personal service can be arranged for by application at the office of the United States Marshal, which will usually be in the United States Courthouse. However, there is no requirement that the Marshal's services be used, and counsel will probably prefer to serve the Commanding Officer of the AFEES himself, or to have someone else whom he trusts do so. The Marshal's office cannot in most cases be relied upon to make service as promptly as counsel would wish. In some judicial districts, the clerk must issue a form to authorize someone other then the Marshal to make service.

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¶ 3108. Form of Petition

The following is a form petition for habeas corpus. Local rules will determine whether it is to be filed on long or short paper, whether the caption arrangement suggested is to be used, and what form the verification must take.

In the United States District Court
for the –– District of ––––
–– Division[1]

United States of America
ex rel. [Detainee––––],[2]
Petitioner

No. ––

v. [Custodian–––––],
Respondent

PETITION FOR WRIT OF HABEAS CORPUS

JURISDICTION

1. This court has jurisdiction under 28 U.S.C. §§ 2241(a), 2241(c)(1) and 2241(c)(3).[3]

PARTIES

2. Petitioner [a citizen of the United States] is a registrant of Local Board No. [––], [*City*], [*State*], Selective Service Number [––––].[4]

3. Respondent is the Commanding Officer, Armed Forces Examining and Entrance Station, [*City*], [*State*], and as such has custody over the person of the petitioner.

CLAIM

4. Petitioner submitted to induction into the Armed Forces of the United States at the Armed Forces Examining and Entrance Station over which respondent has charge on [*date*]. He is now being held at the Station in the custody of the respondent.

5. The induction of petitioner was unlawful because the Order to Report for Induction (SSS Form 252) under which he was inducted was issued in violation of the Military Selective Service Act of 1967 and the rules, regulations and directions issued pursuant thereto, all as more fully set forth in paragraphs 6 through [final paragraph].

1. Or "In the United States Court of Appeals for the ––– Circuit" or "In the Supreme Court of the United States."

2. Or the name of the next friend may be pleaded here, if the application is by a next friend. In addition, some districts require that the parties' residence addresses be placed in the caption of the first pleading filed, and the clerk if instructed not to accept pleadings which do not conform to this rule. Local rules should be consulted.

3. At this point, if the petition is addressed to other than a district judge, the reason for not so presenting it should be pleaded.

4. Or, if the petition is a next friend application, the recitation should be "Petitioner is a citizen of the United States, and sues as next friend of –––– [giving details set out above for the petitioner]. The reason this application is not prosecuted by the prisoner himself is ––––."

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The petition should then allege the circumstances leading to issuance of the induction order of the petitioner in detail. The purpose of going into detail is to make the initial pleading weighty and thorough. Moreover, since the petition must be signed and verified by the petitioner, 28 U.S.C. § 2242, statements in it made upon the basis of personal knowledge are evidence of the facts asserted and may be referred to as such in argument upon the petition. The evidentiary value of the assertions in the petition may be of particular use if it is necessary to seek provisional relief. See ¶ 3110 *infra*.

In detail, the allegations should include the date of registration of petitioner, the date of filing of any important forms (such as SSS Form 150 claiming conscientious objection), the dates and details of important procedural errors upon which it is proposed to rely, and the date of the Armed Forces Physical and of the mailing of the Statement of Acceptability (DD Form 62), see ¶ 1119 *supra*. The petition should spell out the procedural steps by which the petitioner exhausted his administrative remedies. Since the case will probably be decided principally upon the basis of the petitioner's selective service file, counsel may attach portions of the file to the petition as exhibits. See F.R.Civ.P. 10(c). He should do this particularly with statements of position by the registrant, such as a Form 150 which is articulate and well-reasoned.

At the conclusion of the recital, the petition must contain a prayer for relief:

> WHEREFORE, your petition prays:
>
> 1. That under 28 U.S.C. § 2243 this Court issue an order that the respondent show cause why this petition should not be granted and the petitioner discharged.
> 2. That this Court set out in the Order a return date of three days.[5]
> 3. That this Court set the matter down for hearing within five days after the return.[6]
> 4. That this Court order the respondent to release petitioner forthwith pending the final determination of this petition,[7] or, in the alternative, that respondent not suffer petitioner to be removed from the jurisdiction of this Court pending the final determination of this petition.
> 5. That this Court hear and determine the matter and upon final hearing issue an order directing the respondent to discharge petitioner from his custody and from the custody of the armed forces.
>
> [signature of petitioner ———]
> [signature of attorney———]

A verification is also necessary:

> State of —— SS:
>
> [Petitioner], being duly sworn, deposes and says that I am the petitioner herein; that I have read the foregoing Petition for Writ of Habeas Corpus; that the allegations of fact therein are true except that when the allegations are made upon the basis of information and belief and as to those I believe them to be true.
>
> [petitioner ———]
>
> [notarial block and seal]

5. 28 U.S.C. § 2243.
6. *Id.*
7. *See* ¶ 3116 *infra*.

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¶ 3109. Pleading –– In Forma Pauperis Proceedings

If the petitioner is indigent, he may apply for leave to proceed in forma pauperis. 28 U.S.C. § 1915. The pleadings for this purpose should be captioned in the same manner as the petition itself, and will be as follows:

APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, [––––], by his undersigned counsel and pursuant to 28 U.S.C. § 1915, moves this Court for an order permitting him to proceed in forma pauperis and in support of this application refers the Court to the attached affidavit.

____

[attorney]

The affidavit in support should be in standard form. To save time, the responses to the questions in the affidavit may be written in, in ink, by the affiant after the affidavit, in the form below, has been typed up:

AFFIDAVIT IN SUPPORT OF APPLICATION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

[*Petitioner*], being duly sworn, deposes and says: I am the petitioner in the above-entitled case; I am filing this affidavit in support of my application for leave to proceed in forma pauperis without being required to prepay fees, costs, or give security therefor; I cannot pay said fees and costs and still be able to provide myself [and my dependents] with the necessities of life; I believe I am entitled to the relief sought in this action, as more particularly shown by the petition for habeas corpus filed herein.

I further swear that the responses which I have made below to the questions relating to my ability to pay the cost of prosecuting this case are true.

1. Are you presently employed? [Answer.]

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends or other source? [The usual answer will be no, but be alert for such interest-bearing assets as savings accounts, etc.]

3. Do you own any cash or checking or savings account? [Give balance if answer is yes.]

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furniture and clothing)? [Answer.]

5. List the persons who are dependent upon you for support and state your relationship to those persons. [Answer.]

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

____

Petitioner

[notarial block and seal]

The granting of leave to proceed in forma pauperis will usually accompany the order to show cause. See ¶ 3112 *infra*.

¶ 3110. Applying for Temporary or Provisional Relief

Since habeas corpus is a civil action, the Court has the power under the All Writs Act, 28 U.S.C. § 1615 to issue orders in aid of its jurisdiction and under F.R.Civ.P. 65 to issue an injunction pending the outcome of the litigation in order to keep the detainee within the jurisdiction of the court or for other purposes. Therefore, if there is real likelihood that the detainee will be removed from the court's jurisdiction, or placed under military orders, provisional relief may be applied for in the form of a Motion for Temporary Restraining Order or Motion for Preliminary Injunction.

In moving for a temporary restraining order at the threshhold of the litigation, the petitioner must show that he is likely to suffer immediate and irreparable harm unless the requested relief is granted.[1] Under F.R.Civ.P. 65(b), a temporary restraining order may issue at any time after the complaint is filed and will be effective for a period of not more than ten days, subject to being extended for a period of not more than ten days, and may be supported by the allegations of an affidavit or verified complaint. If counsel has been unable to secure agreement that the detainee will not be removed from the jurisdiction, an affidavit of coun-

1. *See* 7 Moore, Civil Practice ¶¶ 65.04-.05 (1968).

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sel may be required to establish those facts. The affidavit may be in the form of a memorandum of points and authorities with an attached attestation, properly notarized. The form of a motion for temporary restraining order is as follows:

APPLICATION FOR TEMPORARY RESTRAINING ORDER

Petitioner, , by his undersigned counsel and pursuant to Rule 65, Federal Rules of Civil Procedure, moves this Court for an order restraining respondent and all persons acting under his authority from removing petitioner from the jurisdiction of this court or subjecting him to military discipline or orders for a period of ten days. If petitioner is removed from the jurisdiction of this court, it will be difficult if not impossible for him to consult with counsel, and there is some chance that the Court will be deprived of jurisdiction, all of which would constitute irreparable harm to petitioner. In support of this motion, the Court is referred to the allegations of the verified petition and to the accompanying memorandum of points and authorities [and affidavit of counsel].

* * *

The order itself must recite either that notice was given the other side or that notice was not given for reasons set forth.

As mentioned above, there is little likelihood that removal of the detainee from the district will defeat the court's jurisdiction.[2] Moreover, such an act might well be contumacious and subject the respondent to punishment.[3] Usually it will be possible to arrange to keep the detainee in the AFEES without the necessity of moving for a temporary restraining order.

A preliminary injunction is applied for in the same form as a temporary restraining order, but may be issued only on notice to the other side.[4]

2. *Ex parte* Endo, 323 U.S. 283 (1944).

3. Griffin v. County School Board, 363 F.2d 206 (CA4 1966).

4. F.R.Civ.P. 65 *See* Part IV, B.

¶3111. Possible Judicial Responses — Dismissal or Order to Amend

If the petition states a claim which is patently without merit, it may be summarily dismissed. In the past, this happened often to petitions for release filed by state prisoners. A habeas corpus petition challenging induction into the armed forces will, however, usually present enough facts to avoid summary dismissal. Moreover, summary dismissal has prompted sharp rebukes from federal appellate courts and the law and the practice has developed of resolving doubts on the merits of the petitioner's claim in favor of granting a hearing on the allegations.[1] Therefore, an order to show cause will be issued if there is any possible basis to the petition.

Even if the district judge should find the petition defective in some matter of form or substance, the better practice is to honor the command of 28 U.S.C. §2242 that the petition may be amended according to the usual procedure in civil actions. F.R.Civ.P. 15(a) provides that a party may amend his initial pleading once as a matter of course at any time before a responsive pleading if filed. Even when amendment is not of right, leave to amend "shall be freely given when justice so requires." *Id.* When the amendment consists of adding or dropping a party, however, F.R.Civ.P. 19-21 govern. See ¶3077 *supra.*

1. *See, e.g.,* Townsend v. Sain, 372 U.S. 293 (1963); Lake v. Cameron, 331 F.2d 771 (CADC 1964); Sokol, A Handbook of Federal Habeas Corpus 1965).

¶3112. Order to Show Cause

If the petition is not dismissed or ordered amended, an order to show cause will issue. Many districts have a standard form of order, in which it is necessary to fill in the relevant dates and an approval to proceed in forma pauperis, if leave to proceed in that manner has been granted. If the district has no form, counsel should present an order to the court for its signature. After the appropriate caption, the order may read:

ORDER TO SHOW CAUSE

Upon the petition for habeas corpus filed herein, it is ORDERED this —— day of ————— 19——, by the United States District Court for the ——————District of——————, that the respondent show cause if any he [they] may have, on or before the —— day of ————— 19——, why a writ of habeas corpus should not be issued as prayed and the petitioner discharged from custody. [It appears to the Court that more than three days to show cause is required.]

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[Leave to proceed in forma pauperis is hereby granted.] The Clerk is instructed to mail [a copy of the petition and] a copy of this order to the United States Attorney for this District.

United States District Judge

¶3113. Return

Within three days, or within such other period as the court may set either in the initial order or after application for extension of time, the return will be filed, certifying "the true cause of the detention." 28 U.S.C. §2243. Like the petition itself, the return may be amended in the same manner as any civil pleading. ¶3111 *supra.* The return will usually include a copy of the petitioner's selective service file. Indeed, including the file may in many cases obviate the need for an evidentiary hearing: The matter can be decided upon the basis of exhibits, briefs and oral arguments.

¶3114. Granting a Hearing on the Petition

After the return, the petitioner or person in custody may deny or contest any new matter in the return. 28 U.S.C. §2243. After the return and a response, if any, the court may (1) dismiss the petition; (2) grant the petition and order the petitioner discharged from custody; or (3), and most probably, order an evidentiary hearing.

The Supreme Court, in *Townsend v. Sain,*[1] established that all doubts are to be resolved in favor of granting a hearing in any case "in which the facts are in dispute." Although *Townsend* was a collateral attack on a state criminal conviction, it construed the same statutory provisions as are at stake in a selective service habeas corpus case.

At the hearing, the manner of putting on evidence is virtually identical to that in a criminal case. See ¶¶2251-74 *supra.*

It should be noted that after the return is filed, there will be an opportunity to negotiate with the United States Attorney. He may be persuaded that the detainee should be discharged from the military. If so, he can agree to a stipulated dismissal, reciting that the detainee is to be discharged without prejudice to his being reprocessed by the Selective Service System, and that the action is to be dismissed.

1. 372 U.S. 293 (1963). *See also* Lake v. Cameron, ¶3111 n.1 *supra.*

¶3115. Appointment of Counsel

Although this part of the *Practice Manual* has been written generally with the assumption that counsel is available to the petitioner, there may be times when that is not so. Even when counsel has entered the case, he may wish to be relieved of the obligation and it may then be necessary for the petitioner, if he cannot afford to retain other counsel, to proceed *pro se* or to secure the appointment of counsel. If a registrant should submit to induction and then file a petition for writ of habeas corpus (or have a friend file it for him), and if he is without counsel, he will want to have counsel appointed.

There is statutory authority for appointing counsel to assist a habeas corpus petitioner in forma pauperis,[1] and even in the absence of statute appointment of counsel is within the power of the court. Although the Supreme Court has not held that there is a constitutional right to counsel in a habeas corpus proceeding, several commentators have argued for the recognition of such a right,[2] and several courts of appeals have stated, on nonconstitutional grounds, that counsel should be appointed, at least when the petitioner is a penitentiary inmate seeking collateral review of a criminal conviction and at least when the petition states a legally-cognizable claim to release.[3]

1. 28 U.S.C. § 1915(d).
2. *E.g.*, Sokol, A Handbook of Federal Habeas Corpus 71-73 (1965).
3. United States *ex rel.* Wissenfeld v. Wilkins, 281 F.2d 707 (CA2 1960); Taylor v. Pegelow, 335 F.2d 147, 148-49 (CA4 1964); Dillon v. United States, 307 F.2d 445 (CA9 1962).

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¶3116. Bail Pending Disposition of the Petition

There are substantial arguments in favor of enlarging the detainee on bail pending disposition of the petition. Upon the filing of a return to the writ, the theory of habeas corpus is that the original restraint is suspended during the pendency of the proceedings, and that the continued safekeeping of the detainee is entirely under the authority of the court which issued the writ.[1] This theoretical principle is well-stated in *A Handbook of Federal Habeas Corpus*[2] and rests upon the distinction between the granting of the *writ* of habeas corpus and the granting of the *relief requested* in the petition for habeas corpus. The writ of habeas corpus, technically, is the command to bring the body of the detainee before the court for an inquiry into the cause of his detention. Therefore, as soon as the court orders a response to the petition, the detainee is, in the law's contemplation, before the court. It follows that the court may order the detainee released, with or without bond or other surety, pending decision on the merits of the petition.[3]

Release pending decision does not appear to have been considered in any reported selective service case, but in the closely analogous field of habeas corpus to secure collateral review of a court martial conviction, it has been used.[4]

There is authority also for this course of action in the Federal Rules of Appellate Procedure, which contemplate that pending appellate review of a district court decision not to release a "prisoner," he may be enlarged on bail with or without surety. F.R.App.P. 23. (All persons whose detention is challenged by habeas corpus are referred to in the statute as "prisoners.") The Rule echoes the provisions of Supreme Court Rule 49, as amended in 1967.

In addition, it may be possible to secure the agreement of the Commanding Officer of the induction station to permit the inductee to go home on leave, with the understanding that if the suit is unsuccessful, the leave time used up in this manner will be deducted from the 30 days annual leave to which every serviceman is entitled. See ¶3104 n.1 *supra.*

1. Stallings v. Splain, 253 U.S. 339, 342 (1920). *See also* State *ex rel.* Evans v. Broaddus, 245 Mo. 123, 149 S.W. 473; Ex parte Vogler, 9 S.W.2d 733.
2. Sokol, A Handbook of Federal Habeas Corpus (1965).
3. *See In re* Kaine, 55 U.S. (14 How.) 103 (1853) (Curtis, J., concurring); Barth v. Clise, 79 U.S. (12 Wall.) 400 (1871).
4. *See* Gusik v. Schilder, 340 U.S. 128 (1950); Noyd v. Bonds, 1 SSLR 3319 (U.S.S.C. 1968) (Douglas, J., in chambers).

¶3117. Discovery

It may be necessary to discover material in the possession of the government. Since the defendant has at any time the right to inspect his own selective service file, it should not be necessary to move for production of the file. However, many of the cases discussed in ¶¶2205-07 *supra*, in connection with the discussion of criminal discovery, are civil cases and may be useful in a habeas corpus proceeding. There has been some debate over the applicability of the federal civil discovery rules to habeas corpus. The Ninth Circuit has held that the rules do not apply.[1] However, its decision is under review by the Supreme Court in the October 1968 Term, which should settle the question.[2]

Material on civil discovery is so widely and easily available that extensive discussion is superfluous here. See ¶3631 *infra* for a discussion of some discovery devices which may be particularly helpful in a selective service civil case.

1. Harris v. Wilson, 378 F.2d 141 (CA9 1968).
2. No. 199, October Term 1968. Certiorari was granted June 17, 1968. 36 U.S.L.W. 3483.

4. *Trial or Hearing*

¶3126. Production of the Body of the Detainee

The detainee must be produced into court unless the issue is solely one of law. 28 U.S.C. §2243. The Supreme Court has expressed strongly the policy in favor of the detainee's personal attendance, and any doubt on the matter should be resolved in his favor.[1] Of course, one way to put additional pressure on the court for production of the detainee is to subpoena him as a witness. His testimony is almost certain to be useful. On the registrant as a witness, see ¶2262 *supra.*

1. Johnson v. Eisentrager, 339 U.S. 763, 778 (1950) ("A basic consideration in habeas corpus practice is that the prisoner will be produced before the court. This is the crux of the statutory scheme established by the Congress; indeed, it is inherent in the very term, 'habeas corpus.' "

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¶3127. Conducting the Hearing

A primary element in a habeas corpus hearing, as in the defense of a selective service criminal case, is to build a record. The res judicata effect of a habeas corpus decision is not as great as that of an ordinary civil judgment,[1] but recent statutory changes in federal habeas corpus law have considerably strengthened the bar and merger effect of a habeas corpus judgment adverse to a petitioner's claim. These changes do not appear to have impact on selective service habeas corpus,[2] but the point is not settled.

Nonetheless, the same care must be used in analyzing the file as in a criminal case, and the same full exploration of the case conducted. An important difference is of course that the habeas corpus petitioner is the moving party, and he must arrange for the calling of the government employees whom he wishes to have testify in his case. Indigent subpoenas are available to the in forma pauperis petitioner. 28 U.S.C. §1915.

1. The extent of the bar and merger effect of a habeas judgment is unsettled. Dicta in Morse v. United States, 267 U.S. 80 (1925), indicate that a habeas judgment "on the merits" bars a second application on the same ground. *See generally* 39 Am. Jur. 2d, "Habeas Corpus" §159-60 (1968).

2. 28 U.S.C. 2244, as amended by Pub.L. 89-711, § 1, 80 Stat. 1104, operates to limit the right to a second hearing in habeas corpus cases brought to challenge a state criminal conviction or a judgment of a court of the United States. *See* 39 Am. Jur. 2d, "Habeas Corpus" §160 (1968).

¶3128. Judgment

The judge, in deciding the case, will enter findings of fact and conclusions of law. F.R.Civ.P. 52. It is usually a good idea to request findings on crucial issues, for the process of appeal is easier if there are specific matters of law and fact which can be focussed upon.

The relief requested will in most cases have been the discharge of the petitioner from military custody. As to I-A-O claimants, see ¶3179 *infra.* On the res judicata effect of the judgment. See ¶3127 *supra*

5. *Appeal*

¶3151. Appeal From Adverse Determination

The appeal from an adverse decision is conducted as a normal civil appeal, and the procedures to be followed are set out in the Federal Rules of Appellate Procedure. Release of the detainee pending appeal is possible under F.R.App.P. 23 and Sup. Ct. R. 49. See ¶3116 *supra* and authorities there cited.

Of course, the government may also appeal from an adverse decision of the district court. If it does so, release pending the outcome of the case is available under F.R.App.P. 23 virtually of right. The reader is referred to general works on civil procedures for the procedures to be followed in taking an appeal, and to ¶2279 *supra* for a discussion of briefing and arguing techniques.

¶3152. Certiorari

Certiorari in habeas corpus cases is governed by the same procedures as in a criminal case, except that 60 days rather than thirty is allowed within which to file the petition and to transmit the record to the Supreme Court. F.R.App.P. 4. See ¶2280 *supra.*

6. *Special Problems*

¶3176. Special Problems — Exhaustion of Administrative Remedies

There are two "exhaustion" questions in a selective service habeas corpus case: one of selective service administrative remedies and one of military administrative remedies.

The second problem is a chimera, perceived at times by the draftsmen of returns to writs of habeas corpus. The rule may be stated: there is no requirement that an inductee, seeking immediately after his induction to challenge the legality of his selective service classification and induction order, exhaust military administrative remedies by seeking a discharge from military authorities, not that he invite a courtmartial

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and seek to defend it upon the ground that he was improperly inducted.[1] Dicta to the contrary in judicial decisions are misguided.

On the other hand, a selective service registrant who wishes to litigate the validity of his selective service classification by means of habeas corpus is under the same obligation as any other litigant under the selective service law to show that he has raised his claim of illegal System action within the Selective Service System in the manner prescribed by the regulations and has taken the administrative appeals available to him from adverse action on his claim. The "same obligation" means just that: the habeas corpus litigant is under no higher obligation to exhaust administrative remedies than any other litigant, and limits on the exhaustion requirement are as applicable to him as to any other litigant. The possible exception to this statement lies in the language of such cases as *Lockhart v. United States,*[2] in which the Ninth Circuit, in granting judicial review of a conscientious objector claim despite the registrant's failure to appeal from the board denial of the claim, mentioned the fact that the case was a criminal prosecution, although without remarking upon the significance of this fact.

An additional ground for excusing failure to exhaust administrative remedies arises by implication from *Petersen v. Clark,*[3] a district court decision in 1968. There, the court held that failure to make application for conscientious objector status prior to issuance of an induction order might be excused because the registrant was misled by the language of SSS Form 150 into thinking that belief in an orthodox God was necessary to the exemption. *Petersen* is limited on its facts to situations in which the registrant's ignorance is the result of misleading by a System official or by some form or document issued by the System itself. See the discussion of exhaustion of remedies at ¶ 2411 *supra,* and refer to the Index.

1. *See, e.g.,* Powers v. Powers, ----F.2d----, 1 SSLR 3191 (CA5 1968).
2. ----F.2d----, 1 SSLR 3204 (CA9 1968).
3. ----F. Supp.----, 1 SSLR 3241 (N.D.Calif. 1968).

¶ 3177. Special Problems -- Supplemental Petitions

A habeas corpus petition generally rests upon alleged illegal action prior to the day appointed for induction. However, it often happens that a registrant is not given the opportunity at the induction center to take some test or fill out some form which might lead to his being declared unacceptable for induction. Such errors in processing have been held to require acquittal of the charge of refusing to submit to induction, see ¶ *supra,* and they should be available as well to a habeas corpus litigant.

They can be pleaded by means of a supplemental or amended petition in those cases in which the original petition has been drafted prior to actual induction.

¶ 3178. Habeas Corpus After Some Time in the Military

The soldier who has served for a while and who wishes release upon habeas corpus based upon alleged error in the process leading up to induction will find himself confronted by several principles which limit his right to relief. The argument that he should exhaust military remedies may be more cogent when he has been in service for some time;[1] it may be claimed that by sleeping on his rights, he has forfeited his claim to discharge.[2] And, of course, it may be that his claim is one which he did not raise within the Selective Service System, but only discovered after entry into service; he would therefore meet the charge of failure to exhaust selective service administrative remedies, discussed in ¶ 2411 *supra.*

The answers to these problems will be as various as the fact situations which give rise to them. The problems of "laches" and failure to exhaust selective service administrative remedies may in a particular case be obviated by arguing that the detainee only recently became aware of his right to release, either because the System misinformed him, or because the law has changed since his induction. In such a case, it may of course be possible to obtain discharge through appropriate military channels. However, often this will not be so, as when a soldier who has been on duty for some time discovers that a belief which he has had since

1. *See, e.g.,* Powers v. Powers, ----F.2d----, 1 SSLR 3191 (CA5 1968) on the general doctrine of exhaustion of military remedies. There do not appear to be any cases on the immediacy with which the writ of habeas corpus must be sought. However, in *In re* Shapiro, Civ.No. 51-67 (D.N.J. 1967) (available in facsimile from SSLR), the court granted relief even though the petitioner had served 1½ years in the Army. Shapiro claimed that his local board had met without a quorum.

2. *See, e.g.,* Pickens v. Cox, 282 F.2d 784 (CA10 1960), holding that a soldier could not claim on habeas corpus that he should not, as a sole surviving son, have been inducted, when he did not raise his claim until after he has been in the military for some time and had in fact been courtmartialed for an offense.

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before his induction would have qualified him for conscientious objector status. And since the Department Defense Directive 1300.6 clearly states that a man in the military may not be discharged by military authorities on grounds of conscientious objection unless his beliefs arose after his entry into the armed forces, the only means such a soldier has of making his claim is by habeas corpus, perhaps after applying to his local board for conscientious objector status, just for the record.[3] None of these problems has been the subject of extensive litigation as yet.

As another example, take a case in which it is discovered that a given local board has for years routinely permitted certain registrants who are in Class I-A and are examined and qualified to escape liability for service, either through favoritism or through inadvertance. A case is decided in which this fact comes to light, and in that case, a registrant is acquitted of the charge of refusal to submit to induction, or is released upon habeas corpus. For the first time, other registrants who have been inducted through the local board become aware that their inductions were illegal. They did not know this fact previously, and although they will of course be met with the argument that they could have known if they had consulted the public records of the board, this argument may be countered with the assertion that until quite recently it was not at all known (even by most lawyers) that improper order of call might be proven so easily and it was not yet generally held that it invalidated an induction order.[4] Thus new law and new facts not discoverable by due diligence may be shown to have come into being. What remedy has the soldier who discovers that he ought not to have been inducted? Arguably, he could bring habeas corpus.

One final problem needs to be mentioned in this connection, however. The petitioner in such a case may be abroad, his training complete (see ¶ 8 *supra*). Under the view of the United States Court of Appeals for the District of Columbia Circuit, the district court having jurisdiction over the officials who command the immediate custodian will have jurisdiction. The decision in the first case to so hold, *Johnson v. Eisentrager,*[5] was reversed by the Supreme Court, but the court of appeals has continued to hold that its finding of jurisdiction survived the reversal.[6]

3. *See* Petersen v. Clark, 1 SSLR 3241 (N.D.Calif. 1968).

4. The problem of retroactive application of a newly-declared legal principle may also arise in this context. *See, e.g.,* Linkletter v. Walker, 381 U.S. 618 (1965); Tehan v. Shott, 382 U.S. 406 (1966); Johnson v. New Jersey, 384 U.S. 719 (1966).

5. 174 F.2d 961 (CADC 1949), rev'd on other grounds, 339 U.S. 763 (1950).

6. Rubenstein v. Wilson, 212 F.2d 31 (CADC 1954); Cozart v. Wilson, 236 F.2d 132 (CADC), *vacated as moot,* 352 U.S. 884 (1956); Day v. Wilson, 247 F.2d 60 (CADC 1957). *See* Comment, 1 Stan. L. Rev. 555 (1949). However, the problem will not arise often, for inductees must be kept in the United States for four months' training before being sent abroad. *See* ¶ 8 *supra.*

¶ 3179. Special Problems — Habeas Corpus to Review Denial of I-A-O Claim

A registrant who claims entitlement to Class I-A-O (available for noncombatant military service) and is granted the I-A-O classification will be inducted and given special training which does not involve the use of weapons. In most cases, this training will be as a medical corpsman. The question considered in this paragraph is whether a I-A-O claimant can litigate the denial of his claim through submitting to induction and seeking habeas corpus: On the one hand, there is authority that the federal courts will not review duty assignments in the military, and since the registrant is arguably asking not for discharge but only for assignment to noncombatant status, it may be urged that habeas corpus is not available to him.[1]

Such a rule seems unduly harsh as applied to a registrant in this situation for it forces him to risk a criminal prosecution to get judicial review of his claim, thus raising constitutional questions not tendered in the case in which habeas corpus is at least theoretically available as an alternative to risking prosecution. Moreover, it is clear that habeas corpus does lie to adjudicate a status which has the effect of imposing a certain kind of confinement. That is, courts will review the *way* in which a detainee is confined, and will decide upon the status in which he is to be placed, even though that determination will not result in his being completely discharged from custody.[2] The rationale of these cases, it is suggested, provides a means for reviewing denial of a claim to I-A-O status.

An additional point may be noted. In *United States ex rel. Phillips v. Downer,*[3] the court held that a registrant had been wrongfully denied an exemption from combatant service (which the court did not describe in terms of a classification symbol) and was entitled to discharge as prayed in his petition for writ of habeas corpus. The court did not discuss the point raised in this paragraph, but its holding supports the contention that habeas corpus is available to test denial of a I-A-O, and the further contention that a prevailing petitioner is entitled not merely to reassignment to noncombatant duties, but to discharge. Such a conclusion at least avoids the line of authority holding that courts cannot review duty assignments, and the cases holding that the local board, not the courts, have the power to classify registrants.

1. *See,* summarizing authority on the state of the law, Hammond v. Lenfest, 398 F.2d 705, 1 SSLR 3108 (CA2 1968). *See* Orloff v. Willoughby, cited and discussed at ¶ 14 n. 3 *supra.*

2. Thus, in *In re* Bonner, 151 U.S. 242 (1894), the Court ordered a misdemeanant released from a penitentiary and confined instead in a common jail, as provided in the state under which he had been convicted. *See also* Coffin v. Reichard, 143 F.2d 443 (CA6 1944); Rouse v. Cameron, 373 F.2d 451 (CADC 1966).

3. 135 F.2d 521 (CA2 1943).

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¶ 3501. Outline of Available Civil Remedies

This section of Part IV (IV, B) deals with civil suits to obtain relief from allegedly illegal Selective Service System action, to enjoin the enforcement of selective service statutory and regulatory provisions, and to enjoin threatened action by boards and officers of the System. Its treatment of the issues, like the treatment of issues in IV, A, is not detailed. There are two basic reasons: First, the substantive aspects of selective service law which are under challenge in a civil suit are discussed in Parts I & II (dealing with the structure of the selective service system and with the selective service administrative process), and in Part III (which, although it deals with the defense of criminal cases, contains a great deal of information about substantive selective service law). Second, there is ample literature on the trial of federal civil cases, and it seems wasteful to repeat in this *Manual* information easily available elsewhere. The editors assume that the reader has access either to Moore's multi-volume treatise, or to the Wright edition of Barron & Holtzoff, or at least to the one-volume Moore's *Manual*. The one-volume Wright hornbook will answer many questions in this field, although it is several years out of date and on such matters as class suits under F.R.Civ.P. 23, rule changes have rendered it obsolete.

Briefly, Part IV, B, deals with civil actions for a declaration of rights following board action which is alleged to be unlawful, and injunctive relief to prevent mootness by enjoining an impending induction; suits to compel System officials to perform duties owed registrants; declaratory judgment and injunctive actions directed broadly at provisions of the selective service law and regulations, both before a single judge and before a statutory three-judge district court; and suits to compel the System to obey the laws in other ways, as by selecting board members without regard to race.

¶ 3502. What is Preinduction Review? —— When to Attempt It

Generally, a registrant must go to the brink of induction in order to obtain judicial review of alleged irregularities in the process leading to his induction. However, over the past two decades, since the decision of the Supreme Court in *Estep v. United States*, establishing the "brink of induction" rule, there have been a number of cases establishing exceptions to it. The question whether and to what extent a registrant may obtain preinduction judicial review is now governed largely by statute, for a 1967 amendment to § 10(b)(3) of the Act provides that "no judicial review shall be made of the classification or processing of any registrant . . . except as a defense to a criminal prosecution instituted under § 12 of this title." The impact of this provision is discussed at ¶ 3530 *infra*.

Generally, preinduction claims fall into three categories:

1. Preinduction habeas corpus, discussed at ¶ 3102 *supra*, to obtain an adjudication of the legality of the induction order, and other suits (for injunction and declaratory relief) commenced to block induction and obtain an adjudication of the legality of the order to report.
2. Suits to correct classification decisions made in the case of an individual registrant, instituted prior to issuance of an order to report for induction, and/or prior to exhausting administrative appeals from the decision within the Selective Service System.
3. Suits to challenge System practices generally, such as against particular classification provisions (established by statute of by regulation, see ¶¶ 2351-53 *supra*), System classification practices, System procedures (such as the selection of local board members), and other matters of general policy which may not be reflected in any particular board decision.

The decision to seek preinduction review will usually be influenced primarily be a decision that it is available under the guiding principles of jurisdiction discussed at ¶ 3530 *infra*. Therefore, further discussion is postponed to those sections.

1. Jurisdiction

¶ 3526. Jurisdiction —— Federal Question —— 28 U.S.C. § 1331

The basic "federal question" jurisdiction set out in article three of the Constitution is vested in the district courts under 28 U.S.C. § 1331:

"The district courts shall have original jurisdiction of all civil actions wherein the amount in con-

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troversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

A suit to challenge illegal action by the System, claiming violation of due process by a board or official, or challenging the statute or regulations, clearly raises a federal question.[1]

The jurisdictional amount question is rather more difficult. In a particular case, it may be that induction will foreseeably result in a loss of $10,000 to a plaintiff, particularly in occupational deferment cases where the occupation is a family business, or in cases in which the registrant's schooling is interrupted at a crucial point. Some registrants whose income is over $5,000 per year will be able to show that their anticipated income, less the pay they would receive in the Armed Forces, will cause a $10,000 pecuniary loss.[2]

However, most registrants will have to rest upon the theory that deprivation of a constitutional or other federal right is itself a wrong rising above the value of $10,000,[3] or will have to seek out an actuary to make a calculation of the reduction in anticipated income (discounted to present capitalized value) which is caused by entering the armed forces and interrupting one's education or work. That is, when one enters the armed forces, and thereby interrupts his education, he does not merely lose two years of school. (However, the impact of such interruption is lessened for an employed inductee by § 9 of the Act. See ¶ 22 *supra*.) He decreases by two the years available for productive work, and the delay in completing his education and entering the work force has adverse economic consequences over the whole of his remaining working life, as compared with another person who does not enter military service. This amount can be computed in the same manner that an actuary would compute the amount lost by one whose education or work is interrupted by two years of hospitalization at the end of which he is fully recovered.[4] Moreover, there may at any given time be actuarial tables showing that the life expectancy of one in military service is less than that of one who does not serve.[5]

However, in general, to minimize jurisdictional problems, the registrant will wish to use other jurisdictional provisions than 28 U.S.C. § 1331. Most selective service cases can be brought under 28 U.S.C. § 1361, and it may be that the plaintiffs in a class suit will be held able to aggregate the amounts of their claims. See ¶ 3601 *infra*.

1. In Oestereich v. Selective Service Board, 393 U.S. , 1 SSLR 3215 (1968), the Court assumed that the district court had jurisdiction under 28 U.S.C. § 1331, subject to proof that the plaintiff's injury met the jurisdictional amount requirements. As to the latter question, *see* the discussion *infra* this paragraph.

2. Such proof is easily made. It should be fairly easy to prove what an employed registrant would have earned had he not been inducted, and to subtract from that amount the pay he will receive as an inductee. The former computation is regularly made by juries in assessing damages in personal injury cases. *See, e.g.*, Standard Jury Instructions for the District of Columbia 66 (1963 ed.).

3. *See* the dissenting opinion of Judge Edelstein in Boyd v. Clark, 287 F. Supp. 561, 1 SSLR 3140 (S.D. N.Y. 1968), *aff'd*, 393 U.S. , 1 SSLR 3287 (1969), arguing that deprivation of a federal right should be considered to be of the value of $10,000, and alternatively, that use of the jursidcitional amount bar to a suit against the Selective Service System may deprive the plaintiff of any federal forum whatever and thus be a denial of due process. *Compare*, on the need for a federal forum, Harlan, J., concurring in Oestereich v. Selective Service Board, 393 U.S. , 1 SSLR 3215 (1968).

4. However, this method of computing damages is not, it should be said, in general use today, and represents a novel departure from the customary method of computation.

5. The reader is referred for further discussion to standard works on damages.

¶ 3527. Jurisdiction — Mandamus — 28 U.S.C. § 1361

28 U.S.C. § 1361 provides:

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

This statute does not require any jurisdictional amount to be pleaded or proved, but only that there be some duty owed to the plaintiff, which is compellable by an action in the nature of mandamus.[1] This section, passed in 1962, permits judicial review of administrative action and provides a convenient choice of forums. See ¶ 3576 *infra* on venue. The duty in question must not, according to the majority view be "discretionary" in character.[2]

1. The statute not only gave a broad choice of venue for actions which formerly might be filed only in Washington, D.C., and solved some problems concerning the suability of federal officers. Wright, Federal Courts § 22, at 62-63 (1963). A thorough analysis appears in Byse & Fiocca, *Section 1361 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 Harv. L. Rev. 308 (1967).

2. *See* Prairie Band of Pottawatomie Tribe v. Udall, 355 F.2d 364 (CA8 1966), *cert. denied*, 385 U.S. 831 (1967); REA v. Northern States Power Co., 373 F.2d 686 (CA8 1967), *cert. denied*, 387 U.S. 945 (1967). These cases demonstrate an unfortunate judicial tendency to construe the ambit of § 1361 narrowly and to seek to avoid decision of the issue by denominating the duty in question "discretionary." This narrow view may be challenged by reference to the decisions concerning the power of an appellate court to issue an extraordinary writ of mandamus directed to a district judge. In such cases, abuse of discretion will permit the writ to issue. That is, though the district judge has "discretion," he must use it within bounds and in the proper manner. *See generally* LaBuy v. Howes Leather Co., 352 U.S. 249 (1957).

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¶3528. Jurisdiction –– Certain Actions Under Color of State Law –– 42 U.S.C. §1983

42 U.S.C. §1983, the federal civil rights statute, is confined to causes of action for violations of civil rights committed under color of state law. This section is useful in the limited range of suits challenging such practices as discriminatory selection of local or appeal board members. Section 1983 is available in such a case because local and appeal board members are selected by the President upon recommendation of the appropriate governor or comparable official, thus arguably supplying the requisite state action. There is no jurisdictional amount requirement under 42 U.S.C. §1983.

¶3529. Jurisdiction –– Freedom of Information Act –– 5 U.S.C. §552

Outside the scope of this Part of the *Manual*, but worthy of mention in this context, is that provision of 5 U.S.C. §552 which provides an easy and quick remedy for refusals on the part of Selective Service System employees and officers (and other officers and agents of the federal government) to produce information concerning agency operations. See ¶31 *supra*.

¶3530. Jurisdiction Precluded –– Sec. 10(b)(3) of the Military Selective Service Act –– Going to the "Brink of Induction"

Generally, a registrant who wants judicial review must go to the brink of induction, and either step forward for induction and litigate in habeas corpus or refuse to step forward and raise his claim as a defense to a criminal prosecution. This paragraph discusses exceptions to this rule.

In *Estep v. United States,*[1] the Supreme Court held for the first time that judicial review of selective service decisions was available in defense of a criminal prosecution for refusal to submit to induction. The Court bottomed its holding upon the proposition that habeas corpus was clearly available to test the validity of an induction order, and that to insist upon a registrant entering the armed forces as a prerequisite to obtaining judicial review was an act of futility, for the courts would be making registrants enter the military one day when it was clear they would be required to release them on habeas corpus the next.[2] Despite *Estep* and in the ensuing years, principally in cases involving particularly egregious cases of local board error, several courts entertained preinduction suits, without a great deal of discussion of the doctrinal basis for doing so.[3] In *Wolff v. Selective Service Board,*[4] the most clearly reasoned of these cases, the court of appeals for the Second Circuit was confronted with the following situation: A number of registrants, including the plaintiffs, Wolff and Short, were arrested in the course of a sit-in demonstration at the Ann Arbor, Michigan local board. Hearing of the arrest, their local board in New York City promptly reclassified the two I-A, stripping them of the II-S deferments they had previously enjoyed. Wolff and Short might have waited until they received an induction order and had "gone to the brink" before bringing suit. They did not do so, but promptly sued to challenge the reclassification. Nor had they exhausted their administrative remedies by taking an appeal to the appeal board. For a discussion of this form of exhaustion, see ¶2411 *supra.* The district court dismissed the action. The court of appeals reversed, holding that the complaint stated a cause of action in that from its verified allegations it appeared, first, that the acts of the protestors had been protected by the first amendment; second, that the local board based its action on the premise that Wolff and Short has interfered with the operation of the Selective Service System, a felony punishable under §12 (a) of the Act, see ¶¶2626-28 *supra.* The court held on the merits that interference with first amendment rights was properly pleaded (without ruling as to whether the plaintiffs conduct was, as they had alleged, protected), and that the local board has no jurisdiction to punish interference with the Selective Service System, for that power is reserved to the Federal district courts. On the issue of preinduction review, which the court termed one of "justiciability," the court held that preinduction review was available because the board's actual and threatened conduct had a "chilling effect" upon the exercise of first amendment rights.

(The court also excused the plaintiff's failure to appeal their I-A's within the System before coming to court. The Director's support of the reclassification made such exhaustion of remedies futile. See ¶2411 *supra).*

Wolff set in train a series of preinduction review cases, as draft protests, including draft card turn-ins and demonstrations against American foreign policy, led to similar punitive reclassifications.[5]

1. 327 U.S. 114 (1946).
2. 327 U.S. at––––.
3. These cases include Townsend v. Zimmerman, 237 F.2d 376 (CA6 1956); *Ex parte* Fabiani, 105 F. Supp. 139 (E.D.Pa. 1952); Tomlinson v. Hershey, 95 F. Supp. 72 (E.D.Pa. 1949). *See also* Schwartz v. Strauss, 206 F.2d 767 (CA2 1953) (Frank, J., concurring).
4. 372 F.2d 817 (CA2 1966).
5. These cases are collected in SSLR's *Recent Decisions* section. *See Index* under "Judicial Review."

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Congress, reacting to *Wolff* and at the urging of the Director of Selective Service,[6] passed the 1967 amendment to § 10(b)(3), limiting the availability of judicial review:

"No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution under section 12 of this title, after the registrant has responded affirmatively or negatively to an order to report for induction. . ."

The reclassifications continued, as did preinduction challenges to them, with the added contention that § 10(b)(3) was either unconstitutional or inapplicable. In the case of draft card turn-ins, the local boards acting at the suggestion of the Director in LBM 85, not only reclassified registrants who dispossessed themselves of their selective service certificates, but declared such registrants "delinquent" and ordered them for priority induction.[7] See ¶ 1098-1107 *supra.* The cases brought challenging these reclassifications were many,[8] but the first to reach the Supreme Court was *Oestereich v. Selective Service System.*[9]

Oestereich was a divinity student, and on this basis was classified IV-D under the provisions of § 6(g) of the Act. See ¶ 1069 *supra.* He turned in his selective service certificates solely to protest the war in Vietnam, according to the uncontested allegations of his verified complaint. His local board reclassified him I-A and declared him delinquent. He took an appeal to the Selective Service Appeal Board for Colorado, which upheld his classification as I-A.

Oestereich then filed suit in the United States District Court in Colorado. The court dismissed the action, relying in part upon the amendment to § 10(b)(3).[10] The Tenth Circuit affirmed without opinion.[11] Oestereich sought certiorari and a stay of his then imminent induction was granted by Mr. Justice White. The petition for certiorari claimed that the turn-in was protected speech and hence nonpunishable, that the use of the delinquency regulations was improper, and that preinduction review was constitutionally required to be made available. The petition evoked an interesting response from the Solicitor General.[12] In his memorandum concerning certiorari, the SG urged that the case be remanded to the district court with directions to grant the relief prayed for—an injunction and a declaratory judgment that Oestereich was entitled to a IV-D exemption, provided only that Oestereich could prove he met the jurisdictional amount requirements of 28 U.S.C. § 1331. See ¶ 3526 *supra.*

The Supreme Court, however, granted certiorari and set the case down for plenary consideration.[13] The Solicitor General argued in his brief on the merits, that in the majority of cases judicial review by habeas corpus or in defense of a criminal prosecution is all that is permitted by § 10(b)(3), but that the statute should be interpreted to provide preinduction review when a local board had acted to deprive a registrant of a statutory exemption (but not a deferment, whether statutory or regulatory in origin.)[14]

The Supreme Court, in an opinion adhered to by five Justices, reversed the lower courts, accepting the Solicitor General's position in large measure.[15] The Court held (1) that there is no statutory authority to revoke a statutory exemption (for which Oestereich concededly qualified) by use of the delinquency power, that therefore the conduct of the board in revoking Oestereich's IV-D was "basically lawless;" (2) that § 10 (b)(3)'s restriction on judicial review cannot be read literally for to do so would do violence to the Congress' intent and perhaps render the restriction unconstitutional, and (3) that preinduction review should be available to correct such clearly erroneous behavior by a local board. Justice Harlan concurred upon the ground that Oestereich's claim of System error involved no factual question and invited the board to make no discretionary decisions involving the weighing of evidence and was therefore one of a class of claims which can be disposed of on the pleadings without significant interruption to the normal processes of induction.[16] Second, Justice Harlan noted that the question of constitutional interpretation, and indeed all "purely legal" questions, are unsuitable for determination by part-time volunteer local boards before whom the registrant may not be represented by counsel. Justices Stewart, White and Brennan dissented.

The same day as *Oestereich,* the Court decided *Clark v. Gabriel*[17] on the papers without hearing oral argument or permitting full briefing. Gabriel, a registrant of a Northern California draft board, applied for and was denied a conscientious objection exemption (I-O). He sought preinduction judicial review, and the district court issued a preliminary injunction, holding that to interpret § 10(b)(3) as precluding judicial

6. *See* Hearings Before the Committee on Armed Services, House of Representatives, 90th Cong., 1st Sess., pp. 2636-38, (1967). *See* ¶ 10 n.1 *supra.*

7. The legal theory upon which challenges to these reclassifications were based is set out, in part, in Griffiths, *Punitive Reclassification of Registrants Who Turn In Their Draft Cards,* 1 SSLR 4001 (1968).

8. *See* notes 5 and 7 supra.

9. 393 U.S. ---, 1 SSLR 3215 (1968). SSLR closely followed the *Oestereich* case. Developments are reported at 1 SSLR 3027, 1 SSLR 10 (1968).

10. 280 F. Supp. 78, 1 SSLR 3027 (D.Colo. 1968).

11. 390 F.2d 100, 1 SSLR 3028 (CA10 1968).

12. The SG's response is reprinted in part at 1 SSLR 3028. *See also* Griffiths, *Some Notes on the SG's MEmorandum in* Oestereich, 1 SSLR 4012 (1968).

13. 1 SSLR 10 (1968). The Selective Service System, disagreeing with the SG's views, first sought to file its own memorandum in support of the courts below, and then when this course proved impossible to follow, prevailed upon the Solicitor General to include the Selective Service position in the brief filed on behalf of the United States as "another view" shared neither by the Solicitor nor by the petitioner.

14. The Solicitor General's brief is available in facsimile from SSLR.

15. 393 U.S. ---. 1 SSLR 3215 (1968).

16. Under Justice Harlan's view preinduction review would be available whenever the question at issue was predominantly one of law.

17. 393 U.S. ---, 1 SSLR 3220 (1968).

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review would render it unconstitutional as applied.[18] Construing the injunction as an adjudication of unconstitutionality, the Solicitor General took a direct appeal to the Supreme Court.

Per curiam, the Court reversed and held § 10(b)(3) constitutional and applicable to preclude preinduction judicial review in Gabriel's case. The Court noted that conscientious objector status is "expressly conditioned" on the "registrant's claim being 'sustained by the local board.' 50 U.S.C. App. § 456(j)."[19] It held that the weighing of evidence in the typical conscientious objector case is precisely the sort of determination by the board the review of which would cause litigious interruption of the process of induction. Interpreting *Oestereich*, the eight members who subscribe to the *per curiam* disposition said:

"In *Oestereich* the delinquincy procedure by which the registrant was reclassified was without statutory basis and in conflict with petitioner's rights explicitly established by statute and not dependent upon an act of judgment by the board."

This summarizes, it may be argued, the central meaning of *Oestereich*. *Gabriel* and *Oestereich*, taken together, establish that judicial review prior to induction is available at least in cases in which the registrant is stripped of a statutory exemption to which he is entitled on the undisputed facts. It may also be argued that a registrant is entitled to review in which on the undisputed facts he has been stripped of a statutory right to *deferment*, such as the §6(h)(1) right to an undergraduate II-S. See ¶ 1057 *supra*. Two courts of appeals have held to the contrary with respect to the II-S,[20] but their decisions rested principally upon the excepting language in §6(h)(1) ("the President shall, under such rules and regulations as he may prescribe, provide for" undergraduate II-S deferments), rather than upon a distinction between "exemption" and "deferments." Such a distinction was urged upon the Supreme Court by the Solicitor General, it will be recalled but *Oestereich* does not appear to use the term "exemption" in its technical sense, and the paragraph quoted above from *Gabriel* certainly does not bespeak an intention to adopt the distinction.[21]

It may also be urged that *Gabriel* and *Oestereich* establish that preinduction review is available to compel performance of any clear legal duty owed a registrant and which may be seen to arise upon the (virtually) undisputed facts. This reading is supported by the interpretation of *Oestereich* in the *Gabriel* opinion, and follows closely Justice Harlan's reasoning in his concurring opinion in *Oestereich*. Such a rule would have the effect of making preinduction review available in any situation in which mandamus would also be available.[22] Of course, under this interpretation, judicial review of agency directives as opposed to "classification or processing" of individual registrants,[23] would also be available.[24]

Taking a somewhat different approach, *Oestereich* may perhaps come to be interpreted as an application to the Selective Service System and to § 10(b)(3) of the rule applied in *Leedom v. Kyne*[25] to the National Labor Relations Board and to the judicial review preclusion contained in § 10(c) of the Taft-Hartley Act. In *Leedom*, the National Labor Relations Board had, on the undisputed facts, placed in the same bargaining unit both professional and nonprofessional employees, in flat contradiction to ¶ 9(b)(1) of the Taft-Hartley Act, which prohibited such mixing of professionals and nonprofessionals. The professionals, through their employees' association, brought suit to set aside the Board's order. The Board contended that the suit was precluded by ¶ 10 of the Taft-Hartley Act, which made judicial review available only in a proceeding brought to enforce an order of the Board restraining an unfair labor practice. The Supreme Court held for the professionals on the ground that the statutory right not to be placed in the same bargaining unit with nonprofessionals should not be undermined by an unduly literal application of another statutory provision, the section limiting judicial review. The action of the Board, the Court held, "deprived the professional employees of a 'right' assured to them by Congress. Surely in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given." (358 U.S. at 189.) However persuasive the analogy, one must not forget that *Leedom* appears limited to *statutory* rights. One wishing for a broad reading of *Oestereich* would press as well for preinduction review when a constitutional right was violated, recognizing that any violation of due process of law under the fifth amendment,[26] and hence reviewable prior to induction. Relief under *Oestereich* and *Gabriel* would, under the above interpretation, be available whenever the board had clearly departed from a prescribed procedure, either statutory or regulatory, as well as when a "statutory right" to classification was taken away by board action. Review would also be avail-

18. 1 SSLR 3140 (N.D.Calif. 1968). *See also* Petersen v. Clark, F. Supp. , 1 SSLR 3132 (N.D.Calif. 1968).

19. One can only conclude that this point was not well-considered. This sort of reliance on the claim being sustained by the board, if pursued, would lead to the overruling of *Estep* and an end to *all* judicial review. The statement is, therefore, either makeweight or absurd.

20. Breen v. Selective Service Local Board No. 16, ----F. 2d----, 1 SSLR 3316 (1969); Kolden v. Selective Service Local Board No. 4, ----F.2d----, 1 SSLR (1969).

21. *See* the dissent of Feinberg, J., in *Breen, supra* note 20.

22. Therefore, preinduction review would always be available under 28 U.S.C. §1361, with its liberal venue provisions and lack of a jurisdictional amount requirement. *See* ¶ *supra*. This reading is supported by Armendariz v. Hershey, 1 SSLR 3323 (W.D.Tex. 1969), and Carey v. Local Board No. 2, 1 SSLR 3326 (D.Conn. 1969).

23. *See* Harlan, J., concurring in *Oestereich*.

24. At least this would appear to be the case. The impact of Boyd v. Clark, 287 F. Supp. 561. 1 SSLR 3140 (1968), *aff'd per curiam*, 393 U.S. 1 SSLR 3287 (1969).

25. 358 U.S. 144 (1958).

26. Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957).

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able whenever it clearly appeared that the board had acted upon the wrong legal premise, as in the "error of law" cases discussed at ¶¶ 2409-10 *supra.*[27]

An additional ground for preinduction judicial review is suggested in Justice Harlan's concurring opinion in *Oestereich,* and finds support in *Wolff v. Selective Service Local Board No. 15*[28] (decided before the 1967 amendment to § 10(b)(3)), and in the obscenity judicial review case of *Freedman v. Maryland.*[29] Justice Harlan, as noted above, included constitutional issues as among those upon which preinduction review should be available.

In *Freedman,* the Supreme Court struck down Maryland's system of licensing films for showing upon the ground that it did not provide for a prompt and final judicial determination of the issues of obscenity. The statute in *Freedman* required the exhibitor of a motion picture to obtain a license before the film could be exhibited. Exhibition of the film after a license had been denied, or without seeking a license, was a criminal offense. The Court held this system, providing no means for prompt judicial intervention prior to the exhibitor placing himself in jeopardy of a criminal conviction, placed first amendment rights too much in jeopardy. It may be argued upon the basis of *Freedman* that claims of first amendment rights must be the subject of preinduction judicial review as well, for to require the registrant to risk loss of liberty to gain review places too high a burden upon his exercise of freedom of speech and religion. *Wolff* clearly follows this rationale, and rests explicitly upon the "chilling effect" of threatened board action upon the exercise of speech rights. However, first amendment rights may be claimed to be at issue in a broader range of cases than *Wolff* and *Oestereich,* both of which involved protest actions against the draft and American foreign policy. For example, it may be argued that the freedom of religion issues tendered by a conscientious objector case are worthy of preinduction review, as when it is claimed, for example, that the board has conditioned the granting or denial of CO status upon an unconstitutional distinction between particular faiths.[30] The ministerial exemption may also raise questions of constitutional interpretation under the first amendment.[31]

In sum, the law after *Oestereich* is uncertain, and the theory upon which the case will be held to have been decided remains an open question.

27. This standard is similar to that employed in granting a preliminary injunction. *See* ¶ 3627 *infra.*

28. 372 F.2d 817 (CA2 1966), discussed *supra* this paragraph.

29. 330 U.S. 51 (1965).

30. *See* Sherbert v. Verner, 374 S. 398 (1963), ¶¶ 3, 1038 *supra.*

31. *See* ¶ 1067 *supra.*

¶ 3531. Jurisdictional Declined — Failure to Exhaust Administrative Remedies

Before going to court a litigant challenging administrative agency action must generally seek, within the agency, to raise and gain review of his claim. This "exhaustion of remedies" rule applies as well to selective service proceedings, although with some exceptions. See ¶ 2411 *supra* for a full discussion of these exceptions. As a judge-made rule, the exhaustion requirement can be relaxed by judicial decision.[1]

1. So held Vaughn v. United States, ----F.2d----, 1 SSLR 3277 (CA8 1968); Lockhart v. United States, ----F.2d ----, 1 SSLR 3204 (CA9 1968). *See also* ¶ 3530 n.10 *supra.*

2. *Procedural Devices*

¶ 3551. Procedural Devices

To be distinguished from the discussion of jurisdiction above is that of the procedural devices available for vindicating claims. That is, under the general federal question jurisdiction, and in aid of its jurisdiction under the mandamus provisions, a federal court may grant relief in the form of a declaratory judgment, injunction, mandamus, a judgment for money damages, and so forth.

Generally, the form of relief requested will be determined by the kind of case, and by the amount of time available within which to litigate. The principal provisions of law are applicable in determining the form of relief to be requested:

28 U.S.C. § 2201-02 creates the remedy of declaratory judgment.

28 U.S.C. § 1361, in addition to creating jurisdiction, defines the nature of relief which may be granted; "in the nature of mandamus." See ¶ 3527 *supra.*

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F.R.Civ.P. 65 defines the availability of temporary restraining orders, preliminary and final injunctions.

28 U.S.C. §§2282 and 2284 require proceedings to enjoin the enforcement of a federal statute to be heard and determined by a three judge district court and set out the procedure to be followed in invoking the aid of such a court. See ¶3628 *infra*.

3. Venue

¶3576. Venue

As a result of a 1962 amendment to the Judicial Code, venue in actions against federal officers and agencies in their official capacities is considerably less difficult a problem than formerly.[1]

28 U.S.C. §1391(e) provides:

"(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought."

The effect of this provision is to permit venue to be laid in any of the following districts, in the typical selective service case, with personal service upon the defendant or defendants who reside in the district and service by certified mail upon all other defendants:

(1) In the judicial district in which the defendant's local board is located if it is desired to challenge an action of the local board, such as an illegal deprival of a procedural right or issuance of an invalid induction order. Such a venue choice would rest upon the board members living in the district or upon the cause of action "arising" there.

(2) In the judicial district in which the local board of transfer is located, in a case in which the induction order which is the subject of challenge has been transferred and an Order for Transferred Man to Report for Induction (¶1125 *supra*) has been issued, although to ensure the availability of such a venue choice, the local board of transfer should be made a party, unless the plaintiff resides in the judicial district in which the action is brought.

(3) In the judicial district in which the plaintiff resides, without regard to whether the local board is made a party, This venue choice is most commonly used in suits challenging the validity of Acts of Congress or of regulations, in which the party defendant is the Attorney General,[2] or the Director of Selective Service.[3]

(4) In the judicial district in which the State Selective Service Headquarters or National Selective Service Headquarters is located. This venue choice may be made when the action complained of took place at one of these places.

Service of process is in accordance with the provisions of Rule 4(d).[4] See also ¶3107 *supra*.

1. The section has not yet been the subject of extensive judicial consideration. *See, e.g.,* Rechany v. Roland, 235 F. Supp. 79 (S.D.N.Y. 1964). 2 Moore, Federal Practice ¶4.9 at nn.31-32.

2. As when it is the purpose of the suit to enjoin the enforcement of operation of a statute. *See, e.g.,* Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

3. As when it is desired to enjoin the operation of some portion of the Act which the Director administers, or some portion of the regulations or of some advisory directive. *See, e.g.,* Nat'l Student Ass'n v. Hershey, 1 SSLR 3026 (D.D.C. 1968).

4. *See* 2 Moore, Federal Practice ¶4.9.

4. Parties

¶3601. Parties Plaintiff — Class Suits

One proper, and probably necessary, party plaintiff in any action of the type under consideration in section B of Part IV is of course the selective service registrant. However, other parties may include a dependent or employer of the registrant, and the possibility of a class suit should not be overlooked in appropriate cases.

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An employer will be a proper party plaintiff in any action in which an occupational deferment is at issue. Although the judicial review provisions of the Administrative Procedure Act do not, in terms, apply to selective service cases, an employer is under the regulations given the right to request an occupational deferment for a registrant and is given the opportunity to appeal from an adverse determination. It would appear, therefore, that he has standing to sue.[1]

Similarly, a dependent, who may under the regulations claim a dependency deferment on behalf of a registrant and appeal from ad adverse determination by the local board, should have standing to sue.[2] An employer or dependent may, it may be argued, aggregate his claim with that of the registrant for the purpose of arriving at the jurisdictional amount.[3]

Class suits are another means of aggregating claims. Class suit plaintiffs may be able to aggregate the monetary value of their claims for the purpose of reaching the proper jurisdictional amount under 28 U.S.C. § 1331. See ¶3526 *supra*. This question has divided the ciruicts, and resolution by the Supreme Court is expected at the October 1968 Term.[4]

Under the 1966 amendments to the Rules of Civil Procedure, class actions may be maintained in more cases than formerly.[5] F.R.Civ.P. 23 now provides:

> "(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

The class action is uniquely suitable, therefore, to the resolution of large questions of law which touch upon the rights of every registrant within a particular area and as to which different local boards, different state directors, or different appeal boards may decide differently, thus subjecting the members of the class to different treatment upon the same facts, and calling upon the System to behave in different ways towards different registrants. The class of registrants may be defined as broadly as the practice challenged in the suit permits. In one case, a given local board may be behaving improperly. In another, a State Director may

1. Since the regulations give employers and dependents the right to apply for the deferment of a registrant and to take appeals from adverse determinations, *see* ¶¶1054, 1059, 1085-89 *supra*, they would be "parties" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 551(4). A party before the agency is indisputably entitled to judicial review of its orders to the extent they affect him. *See* Wisconsin v. FPC, 292 F.2d 753 (1961).

2. *See* note 1 *supra*.

3. Generally, the rule is that when several plaintiffs sue a single defendant, they may *not* aggregate the amount of their claims to reach the jurisdictional amount. *See* Wright, Federal Courts § 36, at 102 (1963). However, there is an exception to this rule, permitting joinder "where the several parties have a common undivided interest and a single title or right is involved." *Id.* Cases in which such an interest or title was held to exist when, for example, distributees of an estate sued the converter of the estate. *E.g.*, Shields v. Thomas, 58 U.S. 3 (1855). In the case of a selective service registrant, the single question is the propriety of the board's classification, or its failure to conform to the rules in specified ways. The duty may therefore be denominated single, although it has more than one adverse result upon more than one plaintiff.

4. The pending cases are Gas Service Co. v. Coburn, 36 U.S. L.W. 2537, -- F.2d -- (CA10 1968), No. 109, October Term 1968 (holding aggregation permissible under new Rule 23); Snyder v. Harris, -- F.2d -- (CA8 1968), No. 117, October Term 1968 (rejecting aggregation). *See generally* Note, *Aggregation of Claims in Class Actions*, 68 Colum. L. Rev. 1554 (1968).

5. The new class suit provision is so recent that many questions concerning its operation remain to be settled. However, the commentary provided by the draftsmen of the rule is lengthy and detailed, and will answer most questions concerning the nature and scope of its provisions. The commentary is reproduced in the U.S.C. A. version of the new rule, and in 39 F.R.D. at 98-107.

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have a policy which it is desired to challenge. In still another the question will touch a national selective service policy or regulation, or a provision of a statute.

In a class action the judgment binds the defendant, and all those in privity with him. Moreover, a judgment obtained in one judicial district in res judicata as to the rights of all those whom the court determines to be members of the class. F.R.Civ.P. 23(c)(3).[6] That is, if a pattern or practice of the entire selective service system is attacked in a forum favorable to the contention being advanced (the choice of forum being quite broad, see ¶ 3576 *supra*), and the court finds that all registrants are members of the class, and judgment is given for the plaintiffs, any other registrant may use the judgment as follows: He need only file his complaint in the district of his choice, asking the same relief, and move for summary judgment upon the ground that the matter is res judicata. This would be so, it appears, even if the only party defendant in the original action was a given local board not the plaintiff's own, because the United States will have been served in the action under F.R.Civ.P. 4(d)(4), and the judgment will bind all its agencies. Of course, it is a good idea to join the Director of Selective Service, the Attorney General, or other appropriate defendant whose authority is national. If the case involved only one local board and its practices, a registrant of that board could take advantage of the judgment, assuming he were determined to be a member of the class represented by the plaintiffs, in the judicial district of his residence. See ¶ 3576 *supra*.

To sum up, the class action makes it possible to establish principles of law which establish the rights of all registrants as res judicata. Combined with the possibility under 28 U.S.C. § 1391 for picking a favorable forum, the rule is a potentially useful plaintiff's weapon.

It is also a potentially dangerous device, for the judgment determines the rights of the class no matter whether it goes for or against the plaintiffs. Therefore, a suit brought and tried badly, or a suit brought at the wrong tactical moment, can be more than a loss for the representative plaintiff. This possibility puts a heavy responsibility upon counsel who wish to bring such an action.

The complaint should plead the facts which establish the legality and advisability of bringing the suit as a class action, including liberal paraphrases from the language of Rule 23.

6. Of course, the res judicata effect of a judgment is finally determined not by the court rendering the judgment but by the courts which subsequently come to consider it.

¶ 3602. Parties Defendant

The parties defendant will be determined by the nature of the right being asserted. The local board members are in most cases the proper parties, although it is apparently proper to sue the local board as an entity rather than naming and serving the individual members. Other officials of the System may be named if their conduct is in issue in the case.[1]

In cases attacking the validity of the regulations, or of other orders or directives of general application, the person or agency acting under the allegedly invalid provisions should certainly be made a party. The proximate source of the harm complained of, rather than the ultimate source of the directive, appears to be the only indispensable party.[2] However, it is safest and wisest to include the Director of Selective Service in a case in which a directive issued by the National Headquarters is being challenged, and to include the State Director whenever a directive or policy of state-wide application is being challenged. Since most regulations are issued by the President of the United States, he is also a proper party defendant; however, the difficulty of obtaining service on the President and the uncertain extent to which his amenability to process may be governed by immunities peculiar to his office make his inclusion in the case as a defendant an unwise tactic in most instances.

Since parties defendant outside the jurisdiction may be served by mail in any case brought under 28 U.S.C. § 1361, ¶ 3576 *supra*, and in any other case service is relatively easy to accomplish, see ¶ 3107, the pleader should not hesitate to include a party defendant rather than exclude him in a doubtful case.

The provisions of Rule 23 permit a defendant to be sued as a representative of a class. The pleader should not overlook the possibility of making all local boards parties through the device of the class action. See ¶ 3601 *supra*; F.R.Civ.P. 23(a).

In any case in which enforcement of a statute is sought to be enjoined, the Attorney General of the United States is the proper party defendant.[3]

1. The matter of parties proper, necessary and indispensable has been the subject of a great deal of confusing discourse and writing. A 1966 amendment to F.R.Civ.P. 19 attempts to clear up the confusion, by establishing common-sense standards for determining who shall be a party, and providing that when all indispensable parties cannot be assembled in a single forum, this fact shall not impede the forward progress of the action. The Adivsory Committee Notes to the amendment, reprinted in the U.S.C.A. edition of the civil rules, and in 39 F.R.D. at 89-94, explain the substance and application of Rule 19.

2. *Id.*

3. *See, e.g.*, Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

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¶3626. Filing Complaint –– Proceeding In Forma Pauperis

The complaint should be filed as with any other civil complaint. Form books may be helpful to the pleader whose experience is limited,[1] although forms are never as good as the complaints which are drafted by oneself. Generally, the complaint must plead facts, and should in a relatively informal and informative way describe the events giving rise to the controversy. The paragraphs should be numbered, and separate claims should be set apart in numbered series. F.R.Civ.P. 10.

At the conclusion of a recital of facts, a paragraph drawing together the various allegations with a concluding statement as to their legal effect is advisable. The prayer for relief will vary with the type of action.[2] Due to the fact that *Gabriel* and *Oestereich* were decided such a short time ago, it seems fruitless to set out detailed forms of complaints at this juncture. Well-drafted pleadings reaching SSLR will be discussed in current issues of the *Newsletter* and made available through the facsimile service.

In order to proceed in forma pauperis, the plaintiff, through his counsel, should file a motion and affidavit like that set out at ¶3109 *supra*. Appointment of counsel is also discussed at ¶3115 *supra*.

1. As to the form of allegations concerning such matters as jurisdiction and a description of the parties to the action, *see* the sample habeas corpus petition at ¶3108 *supra*. Usually, it will suffice to allege, in the first paragraph of the complaint, that "This court has jurisdiction under . . .", followed by the citation of as many of the statutes listed in ¶¶3526-29 *supra* as are thought applicable. In addition, it may be tactically sound to allege that the court has jurisdiction under one or more provisions of the constitution, such as the first amendment or the fifth amendment, although these provisions do not provide an independent basis for district court original jurisdiction. *See* Wheeldin v. Wheeler, 373 U.S. 647 (1963), especially Brennan, J., dissenting, 373 U.S. at 653.

2. For example, the complaint will conclude "Wherefore plaintiff prays," and contain some or all of the following prayers for relief:

"That defendants be preliminary enjoined, pending the outcome of this action from inducting or attempting to induct plaintiff into the Armed Forces of the United States."

"That defendant Local Board No. –– [or defendants members of Local Board No. ––] be directed to reopen plaintiff's classification and to process his claim for conscientious objection in accordance with applicable statutory and regulatory provisions [as though said claim were filed on –––– (naming a date prior to issuance of an induction order. *See* Petersen v. Clark, F. Supp. , 1 SSLR 3214 (N.D. Calif. 1968).]."

"That the court declare the acts of Local Board No. –– described in paragraphs ––––– to be unlawful and in violation of the provisions of –––––– [citing constitutional, statutory, and regulatory provisions.]."

¶3627. Provisional Relief

In most preinduction relief cases, provisional relief in the form of a temporary restraining order and preliminary injunction will be absolutely essential to prevent the case from being mooted by the plaintiff's submission to induction or made more difficult to maintain by virtue of the plaintiff's refusal to submit to induction.

The rules on obtaining a temporary restraining order and preliminary injunction are set out at ¶3110 *supra*, along with a form of motion.

Each judicial district has a different practice concerning the means by which application is made for temporary restraining order. Generally, the clerk of court will be able to inform counsel which judge is available to hear the application. Although a temporary restraining order may be issued ex parte, it will usually be possible to notify the Assistant United States Attorney who handles selective service matters and arrange for him to be present at the time the application is made.

If the application for temporary restraining order is denied, consideration should be given to an appeal. See ¶3110 *supra*.

Application for preliminary injunction is made in the manner set out in F.R.Civ.P. 65, on notice and with opportunity for the other side to be heard. Again, the practice in the various judicial districts varies on the manner in which counsel may bring a motion for preliminary injunction on for hearing, and the clerk of the district court should be consulted.

It often happens that there will be a choice of judges to whom the application for temporary restraining order or preliminary injunction may be presented. In some districts, one judge is sitting to hear "long motions" and another to hear "short motions," and the applicant is assigned to one or the other based upon the amount of time he estimates is needed for oral argument and the motions clerk's estimate of the complexity of the matter. Only by consulting with counsel experienced in civil litigation in the district can an attorney know what particular procedures to follow to maximize his chance of bringing the matter before the judge of his choice.

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¶ 3628. Motion to Convene Three-Judge Court

In any case in which it is sought to enjoin the enforcement of an Act of Congress, a three-judge federal district court must hear and determine the matter. It has been held that the constitutionality of § 10(b)(3) of the Military Selective Service Act, which precludes certain types of preinduction judicial review, does not require resolution by a three-judge court, principally upon the theory that the question of § 10(b)(3)'s constitutionality is not central to a plaintiff's claim upon the merits.

Generally, three-judge courts are required when it is sought to obtain injunctive relief (an action for declaratory judgment only does not require a three-judge court) against the operation of an entire statutory scheme enacted by the Congress.[1]

The initial pleadings in a three-judge court case must also demonstrate that there are substantial constitutional grounds for enjoining the operation of the act in question.[2] That is, the request for a three-judge court must include a kind of preliminary brief on the merits. In detail, the following steps must be taken:

In the complaint, the first numbered paragraph of the prayer should read: "That pursuant to 28 U.S.C. § 2282 and 2284, a three-judge federal district court be immediately convened for the purpose of providing a prompt and expedited hearing and determination of this cause."

Along with the complaint, the plaintiff must file a motion to convene a three-judge court, as follows:

MOTION TO CONVENE A THREE-JUDGE FEDERAL DISTRICT COURT

Plaintiff, through his undersigned counsel and purusant to 28 U.S.C. §§2282 and 2284 and F.R. Civ.P. 7, moves this Court for the issuance of a notive to the Chief Judge of the United States Court of Appeals for the ----- Circuit of the commencement of this action and for the convening of a three-judge district court to hear and decide the claims presented in the complaint (and motion for preliminary injunction) filed this day.

The grounds for this motion, as more particularly set forth in the attached memorandum of points and authorities, are that the complaint states facts showing substantial constitutional grounds which require enjoining the operation of an Act of Congress, and an injunction to that effect is prayed.

____

Although only a three-judge federal district court may grant a preliminary injunction, 28 U.S.C. § 2282, a single judge may grant a temporary restraining order, and a single judge will generally be the one to supervise discovery. See 28 U.S.C. §2284.

1. *See generally* Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). *See* Note, 69 Colum. L. Rev. 146 (1969) (review of grant of three-judge court).
2. *E.g.*, Williams Jameson & Co. v. Morgenthau, 307 U.S. 171 (1939).

¶ 3629. Government's Responsive Pleading -- Motions

Within 60 days after service of the complaint, an officer or agency of the United States must make answer or other response. (A private person generally has only 20 days.) F.R.Civ.P. 12(a). However, the government need not file an answer within this period, but may elect to proceed by filing one of the motions listed in F.R.Civ.P. 12(b), (e), or (f), thus extending the time for filing an answer until after a decision on the motion. F.R.Civ.P. 12(a). The motions permitted under F.R.Civ.P. 12(b) are the following: lack of jurisdiction over the subject matter; lack of jurisdiction over the person; improper venue; insufficiency of process; insufficiency of service of process; failure to state a claim upon which relief can be granted (*i.e.*, failure to state a cause of action); failure to join a party required under F.R.Civ.P. 19 to be joined. In addition a motion for a more definite statement, F.R.Civ.P. 12(e), and a motion to strike, F.R.Civ.P. 12(f), will delay the time for answering.

Generally, in a civil action of the type under discussion here, the government's first responsive pleading will raise the question of the court's jurisdiction in light of § 10(b)(3) of the Military Selective Service Act, which will then be resolved on motion to dismiss. See ¶ 3530 *supra*.

¶ 3630. Government Responsive Pleading -- Answer

Generally, the government's answer will admit the bulk of the factual allegations of the complaint, and will plead some legal defense to the action. The answer should be checked carefully against the complaint, so that matters as to which there is factual disagreement can be the subject of proper discovery.

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¶3631. Discovery

Discovery in a civil case is governed by the Federal Rules of Civil Procedure 26 through 37. There are a number of works on discovery and it is not necessary to go into detail in this *Manual.* Moreover, counsel will have been able, prior to commencement of the action, to get the basic document, the defendant's selective service file, and to inspect other board records which are a matter of public record.

When "discovery" is mentioned, most lawyers think first of oral depositions. However, depositions are expensive and time-consuming. It may be preferable to use interrogatories under F.R.Civ.P. 31 and 33. Rule 33 interrogatories to a party may be served within ten days after commencement of the action, or earlier if leave of court is obtained. They provide an easy and inexpensive way to obtain information.

F.R.Civ.P. 36 requests for admissions of facts and of the genuineness of documents may also be helpful, although it will usually be possible to obtain such admissions by stipulation with opposing counsel rather than by serving a formal request.

F.R.Civ.P. 34 discovery of documents and objects tends to be rather cumbersome, because an order of the court is required to compel production. Therefore, any documents which it is desired that the government produce should first be requested in interrogatories, if interrogatories are to be served. For example, counsel may ask the following question of a local board member:

> "State the date on which the plaintiff was reclassified from I-O to I-A. Attach to your answer a copy of any minutes of local board action reflecting the reclassification, and a copy of any other writing or document reflecting the reclassification which is now in the custody or control of the Selective Service System."

Technically, the second sentence of the interrogatory is objectionable, as calling for material which can be obtained only by order of the court under F.R.Civ.P. 34, and not by interrogatory under F.R.Civ.P. 33. However, it has been the experience of most lawyers who litigate with the United States that Assistant United States Attorneys will not force counsel to resort to the cumbersome procedure of Rule 34 as to items to which he is clearly entitled.

Claims of overbreadth or of privilege in the discovery process are handled as with any other case. However, since there may be some claim of privilege raised concerning information such as the addresses of local board members, in a case in which that information is relevant, it may be necessary for counsel to make argument concerning the scope of governmental information to which he is entitled in a case raising issues of personal liberty.[1]

1. *See generally* United States v. Reynolds, 345 U.S. 1 (1953) (discovery of Air Force crash report in Tort Claims Suit); Zimmerman v. Poindexter, 74 F. Supp. 933 (D. Hawaii 1947) (discovery of FBI report in suit against federal officer for false imprisonment); Campbell v. Eastland, 307 F.2d 478 (CA5 1962), *cert. denied*, 371 U.S. 955 (1963) (executive privilege held narrowly confined to matters affecting national security).

6. *Trial or Hearing*

¶3651. Disposition of the Case –– Motion for Judgment of the Pleadings

At any time after the pleadings are closed, either party may move for judgment on the pleadings. However, since it is likely that some evidence other than the pleadings and the exhibits to the pleadings will be necessary to the disposition of the case, the usual course is summary judgment.

¶3652. Disposition of the Case –– Summary Judgment

It will not usually be necessary to have a lengthy trial in a civil selective service case. Most cases can be disposed of without any trial at all, by means of a motion for summary judgment when all discovery is complete. A motion for summary judgment is made under F.R.Civ.P. 56, and may rely upon all discovery in the action, as well as upon affidavits made upon personal knowledge as set out in F.R.Civ.P. 56(e). It must set out that there are no material issues of fact which require trial, and that the moving party is entitled to judgment as a matter of law. A memorandum of points and authorities should resemble a brief in appellate litigation, with references to the discovery materials and affidavits, a separate discussion of the applicable law.

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If a motion for summary judgment is contemplated, arrangements can be made with opposing counsel to stipulate the admissibility of particular documents and exhibits. It will often be the case that opposing counsel will agree that the matter should be disposed of on cross-motions for summary judgment, and it may even be possible to arrive at a stipulated set of facts.

¶3653. Disposition of the Case –– Trial on the Merits

If no motion for summary judgment is made, or if the case is for some other reason required to go to trial, it will proceed as any civil case, with variations under local rules and practices. This *Manual* will not attempt to review these stages, for they are the same in all federal civil trials.

The tactics and presentation of evidence in trials on the merits will not vary significantly from those in criminal trials, ¶¶2251-73 *supra*, and habeas corpus trials, ¶3127 *supra*.

¶3654. Judgment

However the case goes to judgment, the court will make findings of fact, F.R.Civ.P. 52, perhaps after giving the prevailing party an opportunity to submit proposed findings. The losing party then has the opportunity to appeal. See F.R.App.P. 4(a) for the provisions on time for appeal, which are complex. In general, 60 days is permitted for the taking of an appeal in a case in which the United States is a party, but this time may be shortened by order on notice.

7. *Appeal*

¶3676. Appeal –– Generally

An appeal lies, in general, only from a final judgment in the action. However, interlocutory relief is available in some cases, and an appeal may upon occasion be taken from the denial of a temporary restraining order, and may always be taken from the denial of a preliminary injunction. A direct appeal to the Supreme Court is provided to after a judgment by a three-judge district court, and the United States may take such an appeal in the cases specified in 28 U.S.C. §1252.

The taking of a federal appeal, including the docketing of the record and the writing of a brief on the merits, does not warrant detailed consideration in this *Manual.* See ¶2279 *supra.* However, counsel should be aware of the potential application of other means of review than appeal from a final judgment.

¶3677. Review by Extraordinary Writ

The courts of appeals have the power to issue writs of mandamus and prohibition in aid of their appellate jurisdiction, a power derived from article three of the Constitution and affirmed by the Supreme Court as early as *Marbury v. Madison.* In *LaBuy v. Howes Leather Co.*, the Supreme Court held that the court of appeals has the "naked power" to issue a writ of mandamus to the district judge whenever it will at some future stage have the power to exercise appellate jurisdiction in the case which is before the judge.[1] However, this "naked power" can, as a matter of sound judicial administration and in light of the manifest policy against review of interlocutory orders by other than appeal of a final judgment, be exercised only when the trial court has clearly abused its power or discretion.[2] Such a circumstance might arise upon a trial court's refusal to take jurisdiction in a clear case warranting it doing so, clearly erroneous granting of a motion to dismiss or to transfer forum, or other order which has a potentially calamitous effect upon the plaintiff's lawsuit but which can speedily and effectively be reviewed on a narrow point of law by the court of appeals. An application for writ of mandamus is an original action filed in the court of appeals. F.R.App.P. 21.

1. LaBuy v. Howes Leather Co., 352 U.S. 249 (1957). *See generally* Comment, 52 Calif. L. Rev. 1036 (1965).
2. *LaBuy, supra* note 1, 352 U.S. at 255.

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¶3678. Review of Denial of Temporary Restraining Orders and Preliminary Injunction

Denial of a preliminary injunction may normally be reviewed upon appeal. 28 U.S.C. §1292(a)(1). Denial of a temporary restraining order may be reviewed only where there are exceptional circumstances of irreparable harm which the trial judge abused his discretion in not restraining.[1] An appeal is docketed in the normal manner in such cases. The district court clerk must be implored to make up a record for the purposes of appeal so that the filing and docketing may take place, and to give the court of appeals a basis for deciding the case.

After the appeal is filed, a motion for summary reversal or other pleading designed to secure prompt consideration should be filed. The clerk of the court of appeals will be able to assist counsel in bringing his case up in the manner most likely to obtain prompt consideration. Since the Federal Rules of Appellate Procedure do not set out a means of summary review, each circuit will have a slightly different procedure.

Of course, an extraordinary writ may upon occasion be the means for obtaining review, and should be used when, for example, it is not possible to perfect an appeal before the action is mooted. Again, the court of appeals clerk will be able to advise counsel on the best way to proceed, or the advice of experienced counsel may be sought.

1. *E.g.*, Woods v. Wright, 334 F.2d 369 (CA5 1964).

¶3679. Certiorari

Certiorari to a court of appeals is governed by the same rules which are applicable in a habeas corpus case. As a practical matter, the right to relief from the Supreme Court may in many cases be meaningless unless counsel can obtain a stay of induction from a single Justice of the Supreme Court. See Sup.Ct.R. 48 for the practice on application for a stay.

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